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Special Freight Services

Allowances and Privileges

PART I

Prepared under the direction of the *Advisory Traffic Council of The American Commerce Association*

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PREFACE

IN the movement of commodities over the various transportation systems of the country there are many special services, allowances and privileges granted the shipper or consignee by the carrier, which have an important effect upon the rate or the shipment and exert a strong influence upon successful distribution and marketing.

Without a proper understanding of these factors it is impossible to take full advantage of the transportation facilities offered or to market goods successfully in competition with those who possess knowledge of their advantages and are able to utilize them in an effective manner. For this reason such knowledge becomes a necessary part of the equipment of all traffic managers, and by its employment markets are reached which would otherwise prove inaccessible or unprofitable.

Prior to the establishment of the Interstate Commerce Law there was a lack of uniformity in the granting of these services, allowances and privileges, and they were often used as a means of giving undue preference to certain shippers.

Since the passage of the act, however, all such matters have come under the regulative authority of the Interstate Commerce Commission, have been legalized and made uniform, and have become a regular and highly essential part of the transportation service. A knowledge of their

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application is a vital requirement in successful commercial or industrial development.

The purpose of this volume and the two volumes to follow is to present and discuss these services, allowances and privileges in such a manner as to show their definite application to freight movements, in conformity with tariff and regulative requirements.

In the present volume the nature of Freight Transportation Service is defined and analyzed, and the Kinds of Service distinguished by Operating Necessities, by Traffic Necessities and by Class and Kind of Equipment are fully presented. The jurisdiction of the Interstate Commerce Commission over the various Special Freight Services, has been fully recorded, and a chapter devoted to the Kinds of Freight Transportation Service as applied to Local and Through Service, and to Fast Freight Line, Preference Freight, Peddler-car and Stop-car service. The remaining chapters discuss Car Equipment and Supply and constitute an exhaustive treatise of this important subject, from operating, legal and regulative standpoint.

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CHAPTER I.

NATURE OF FREIGHT TRANSPORTATION SERVICE.

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CHAPTER I.

NATURE OF FREIGHT TRANSPORTATION SERVICE.

The system of governmental regulation of interstate transportation inaugurated with the passage, in 1906, of the Hepburn amendment to the Act to Regulate Commerce, makes essential to the shipper a definite means of determining the many distinctions existing in the transportation service of the carriers subject to the act. This necessity is more evident today than ever before because of the many ramifications in the interpretation and construction of the regulating laws, based upon the nature of the transportation service. In fact, both of the controlling principles of the Act to Regulate Commerce—the prohibitions of unreasonable rates and unjust discriminations—are only possible of equitable construction and application when due regard is had for the various distinctions in the nature of transportation services.

The regulation of rates is incomplete, unless it includes the service for which the rate is charged. The determination of the reasonableness of a rate *per se* involves a physical analysis of service costs; and the test of the relative reasonableness of rates and charges is always a matter of service comparisons as well as of rate relations. The real purpose of the federal regulating system is to insure to shippers of interstate traffic equality of service and reasonable uniformity of cost of such service. Theoretically, the proper adjustment of freight rates depends

upon the relative quality, scope and cost of the transportation service, and it may be said that, at the present time, both the Commission and the carriers are observing this fundamental relationship with ever increasing practicability in the readjustments of rates.

Transportation service varies in quality and kind from two fundamental standpoints: (1) The nature of the carrier, and (2) the nature of the traffic. Thus, the service of the water carrier is essentially different from that of the rail carrier; and the nature of the traffic causes variations of the service due to the physical nature of the traffic and to the conditions under which the traffic is transported. Since the service of transportation is of superlative importance in the carrying into effect of the great tenets of the regulating laws, and at all times controlling the questions of reasonableness of rates and discriminations, it is imperative, at this point, that we examine with care into the different kinds and qualities of service of the regulated carriers, their causes, natures and purposes, and their relative importance in the general scheme of interstate transportation systems.

§ 1. The Service of the Common Carrier Defined.

The history of state and national legislation, looking to the control and regulation of railroad transportation, makes it apparent that the advent of the steam railroad was not the beginning of the common carrier, but simply a new development in the means employed by the common carrier with which to perform its service. Thus early, England had developed a law of common carrier, from the beast of burden to the sailing ship; we, from the sailing ship to the canal and barge. This development of the law had been through the judicial recognition and application of the common and unwritten law, instead of by

mandatory and remedial statutes. And despite the many and varied statutory laws in this country affecting transportation by railroad and by water, the relationship of the carrier to its customer, as late as 1906, was still basically fixed by the common law.

At common law, a common or public carrier is one who undertakes, as a business, to carry from one place to another the goods of all persons who may apply for such carriage, provided the goods are of the kind which the carrier professes to carry, and the persons so applying will agree to have them carried upon the term prescribed by the carrier, who, if he refuses to carry such goods for those who are willing to comply with his terms, becomes liable to an action by the party aggrieved by such refusal.

4 Elliott R. R., Sect. 1391, et seq.
5 Thompson on Negligence, (2nd Ed.) Sect. 6415.
2 Am. & Eng. Ency. of Law, Title "Carriers."
Redfield, "Railway Carriers," 1.
Hutchins, "Carriers," Sect. 47.

Section 1 of the Act to Regulate Commerce defines the service of transportation for jurisdictional purposes. In addition to the act of carriage the term "transportation" is made to include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or any contract, expressed or implied, for the use thereof, and all service in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported. The purpose of this jurisdictional definition of the transportation service is to give effect to the regulation by bringing within the authority of the Commission the means or agencies of transportation, as well as the subject of the service. It is, in no sense, a new definition of the service of the common carrier, but instead,

an expression of the scope of the authority of the government over the service.

Act to Reg. Com. (as amended), Sect. 1, par. 2.
Arlington Heights Fruit Exchange vs. So. Pac. Co., 20 I. C. C. Rep. 106, 117.
Am. Sugar Refg. Co. vs. D. L. and W. Ry. Co., 200 Fed. 652, 656.
In re Cancellation of Joint Rates, etc., 27 I. C. C. Rep. 353, 363.
The Tap Line Case, 23 I. C. C. Rep. 277.
The Tap Line Case, 23 I. C. C. Rep. 549.

§ 2. Kinds of Service—Distinguished by Operating Necessities.

To divide the transportation service of the rail carrier into "local" and "through" service is a distinguishment of railway transportation service without purpose or value; but so universally are these distinctions in the service accepted by the shipping public that comment must be made for the purpose of correcting the popular misconception that such a distinguishment in the carrier's transportation, is of controlling importance or significance. Such a division of the service is merely incidental, and relatively of small importance, in the adjustment of rates in a concrete sense.

(1) **Local Service.** The local service which the rail carrier must render is, from an operating standpoint, the most expensive and least expeditious service the carrier performs. It is a station service in many cases performed twice daily (morning and afternoon), consisting largely of less than carload shipments. It presents many factors of expense not existing in the handling and carriage of through traffic. For these factors of expense, see Chapter III, Section 1.

As a matter of usage the meaning of the word "local" has been restricted, in an operating sense, to a class of traffic involving a "local station service," whereas the

word, in its proper use, as applied to transportation service and rates, signifies the service and rates of a single carrier. All service in the transportation of traffic, originating and ending on the line or lines of a single carrier, are "local" to that carrier, as contradistinguished from "through" service or traffic coming from, or passing on, the lines of a connecting carrier.

Since "local" is a term descriptive of the railroad operation of a single carrier, it is obvious that it has no important significance in concrete service distinctions.

See "The Interstate Commerce Law," def. of "Transportation" post. and "Reasonableness of Rates."

(2) Through Service. As in the case of the word "local" the term "through" has grown to have, in the minds of many, a local meaning. The word is frequently used to denote any service or traffic not of a local station nature. Thus, the service between terminals of the same railroads, which omits the way station intermediate to the terminals, is often spoken of as "through" service. The proper distinction for "through" service, however, is the service which the carrier renders in the transportation of traffic which either originates at, or is destined to, points on its own lines and comes from, or passes on to, a connecting line, or passes over its lines from points of origin to destinations on lines of connecting carriers.

Again, this term, as descriptive of transportation service, is of no concrete importance because of its generalness.

See "Interstate Commerce Law—Reasonableness of Rates," post.

§ 3. Service Distinguished by Traffic Necessities.

The classification of freight service should be one that is adaptable to the necessities of the traffic transported.

Thus, the service rendered in transporting property of a perishable nature is different from the service necessary to move a commodity of a non-perishable nature. To move a carload of dressed beef one hundred miles requires materially different and more expensive service than to move a carload of gravel the same distance. In the one case special equipment providing for the preservation of the freight is necessary; in the other practically any kind of car may be employed.

(1) **Quality of Service and Equipment Dependent upon Necessity for Speed, Safety and Care in Transit.** It is also apparent that the time occupied by traffic in transit may be a factor, not only in the preservation of the commodity, but in its salability in the market. This is particularly true in the case of meats, and the carrier furnishes not only special refrigerating cars, but maintains and moves such traffic under an expedited train service schedule. The so-called "beef train" or "meat train" has taken its place in the nomenclature of railroading as indicative of a service inclusive, not only of care in transit out of the ordinary, but of maximum speed compatible with safety and operating conditions. To a large extent, of course, the carrier is now relieved from furnishing special refrigerator cars for meat traffic, as the great beef and packing industries own their own refrigerator cars; but the service rendered by the carrier in other respects is altogether of a special order.

It is an axiom of the law that whatever traffic the carrier professes to carry it must furnish both equipment and service in such transportation as will insure its safe and proper carriage. Fruit may not be transported in ordinary freight cars, and while some fruit may not require ice, it necessitates such a class or kind of car as will permit its safe and uninjured carriage, such as ventilator cars. Raw

silk is of a high value and must be transported with the utmost despatch. It is quite customary to run silk trains upon passenger train schedules, owing to this requirement for speed.

The quality of the transportation service consists of three factors: (a) The class of cars required; (b) the care necessary in transit; and (c) the despatch with which the carriage must be made. The quality of the service is further influenced by the nature of the traffic, i. e., (1) its perishability; (2) elements of danger, such as inflammability, explosiveness, etc.; (3) liability to contamination of other commodities; (4) liability of injury of other commodities; (5) weight and bulk; and (6) commercial necessities.

Still another factor bearing importantly upon the quality of the transportation service, is the process of semi-manufacture of goods at one point, their transportation in that state, and subsequent completion at another point; or, as the process usually is, moving in a raw state in a general market direction, but being stopped and partially or completely manufactured in transit, and then subsequently passing in a partially or completely finished state to the ultimate market on a through rate from the initial point of origin. This process calls for a transportation service of such a nature as to provide the necessary additional transit services or privileges required by the traffic. The quality of the service is less affected, however, than the extent or scope of the service.

These services are not necessarily a right which the public may demand, but fall under the head of privileges to be accorded by the carrier under conditions of equal treatment to all. Such transit services are termed "secondary" or "accessorial" services, and will be found treated under their respective heads in subsequent sections.

(2) **Competition—Railroad and Commercial.** Probably no other one factor in the history of our railroad development has exerted as much influence for the benefit and extension of the transportation service as has competition —both railway and commercial. Were it not for competition, the bray of the mule would resound along the tow-path where now the screech of the locomotive is constantly heard. But for competition the uncomplaining and long-suffering shipper of past decades would still be tolerating inadequate and unsafe equipment, uncertain and slow train movements, and chaotic rate conditions. Competition has developed the keen and alert shipper of the present day, quick to demand and require facilities for prompt movement and satisfactory handling, insuring safe, uninjured and undeteriorated condition of transported property. Competition has caused the tremendous extension of railway lines, the opening up of great areas of natural resources and the creation and development of practical markets. Competition has crowded out indifferent and unprogressive railroad management, and in its place has brought forth managing officials who are alive to the great necessities of trade and commerce confronting them, and who are students of the characteristics and needs of the different kinds of traffic which their road is transporting or which they may legitimately procure for their company.

Commercial competition has necessitated development and perfection of the transportation service in all of its many phases, as the processes of agriculture, mining, manufacturing and selling have developed and expanded. Today the textiles of New England must reach the distant markets of the Pacific coast; the fruits of the South and Southwest must arrive in proper condition and on time to meet the demands of the great population centers of the

North and East; the manufactures of the Central West and East must find quick outlets into the great grain producing areas of the West; and the grain and agricultural products of the West require adequate despatch to the eastern and foreign markets. Competition is keen in all of these great lines of trade. Whatever affects the condition, value, time and safety of goods in reaching competitive markets affects their selling-price, and the transportation service, entirely aside from its cost to the shipper or receiver of goods, must conserve all of these competitive features of trade and commerce.

Railroad competition today is almost entirely confined to the quality and kind of service which the carrier is able to render. The contracting freight agent of a few years ago, who went among the shippers and procured the movement of large consignments of freight via his line, through inducements in the way of preferential rates or practices, has been supplanted by the freight solicitor of today who, backed by an alert and progressive management of his road, seeks the traffic of the shipper by offering the quality of service, car supply, train movement, connections at junctions, facilities for handling, the care in transit, the terminal conditions at origin and destination—in short, he procures his traffic upon the merits of his service. To convince the shipper that his line offers and affords a quicker, safer, and more satisfactory service by reason of the equipment, care in transit, and expedited despatch, is the present office of the freight solicitor, instead of conniving with the shipper to cut the rates of competing lines or to afford the shipper some unlawful and unjust preference or discrimination over his own line. To produce and maintain this competitive service has necessitated the progress and development which has taken place in the construction of roadbeds and tracks,

larger and safer equipment, greater and more efficient motive power, adequate facilities for the receipt, transportation and delivery of freight, and the co-operative and more efficient railway management and operation now apparent in our larger railway systems.

(3) **Geographical Relationship of Producing Point and Consuming Point.** The development of areas of natural resources, the ores and minerals of commerce, the growth of agricultural districts, and the creation and development of the market to consume their products, have each exerted a tremendous influence for the improvement and development of the transportation service. The geographical relationship of the producing area and the consuming point has many times been the cause of the construction of railroads and railway systems, as well as the development of adequate and special transportation services. Likewise, the railways have, in many instances, through the judgment and foresight of their officials, found new markets for products that have hitherto remained commercially dormant, and thus stimulated into activity commercial products from among the latent resources of the country.

Thus, there has been established through transportation service between the great producing areas of the country, like the coal fields of West Virginia, Pennsylvania, Ohio, Indiana, and Illinois, the ore beds of the upper peninsula of Michigan, and the manufacturing districts wherein they are consumed and manufactured into commercial articles; from the fruit belts to the great cities; from agricultural states to domestic and foreign markets; from manufacturing districts, like New England, New York, and the central western states to the markets of the West; for the cotton of the South to the mills of the North; for imported raw materials from ports of entry to manufacturing districts;

from producing points to seaboard ports for export; and this through service must be performed by means of the different kinds of special cars and equipment required by the nature of the particular traffic, and with such degree of despatch as may be necessitated by the exigencies of the trade.

In this development of the transportation service great and distinct channels of traffic have been created and are now the subject of regional rate structures and classification divisions, responsive to the trade requirements. So great has become this distribution of commerce through defined service channels that the movement of railway equipment has become more or less periodical in certain directions, in order to handle particular traffic during the times of maximum movement.

§ 4. Service Distinguished by Class and Kind of Equipment.

It is estimated that there are in excess of twenty thousand different and distinct articles of commerce which are transported over the railways of this country. Subjected to comprehensive groupings or classification by the carriers, this wide range of commodities resolves itself into a comparatively few general classes, which require special equipment and cars in their transportation.

(1) Special Commodities Requiring Special Equipment. In order to transport freight in a safe and uninjured condition, the carrier must provide cars or equipment of such a nature as will preserve the property in transit in relatively the same condition in which the carrier receives it. It is fundamental law that the carrier must receive for transportation the kinds of property it professes to carry and to transport such property to its required destination and there deliver it in the same general condi-

tion in which received. Thus, the carrier receives for transportation property which will suffer injury if exposed to inclement weather, and so a car must be furnished which will protect such commodity from weather conditions; perishable freight may be received by the carrier which must be iced else injury will ensue; live animals cannot be transported over long distances unless they receive the proper care in transit; hence, the necessity for the live stock car, the horse car, poultry car, etc., as special equipment. Again, perishable freight may require ventilation instead of icing, with the consequent use of ventilator cars.

Property of large bulk as compared with its weight, such as furniture, automobiles, etc., requires the use of large and commodious cars; hence, the furniture car and the automobile car. Low grade commodities, sometimes called "dead-weight" commodities, such as sand, coal, stone, gravel, ores, etc., require cars of heavy carrying capacity and such as may be easily loaded, thereby necessitating the use of flat cars, coal cars, and gondola cars. Coke, which is light in weight to the space occupied by it, has brought into use a slatted car, so constructed with high sides that the load may be made large enough to afford a remunerative weight in the car. Articles of large dimensions, unusual size or extraordinary weight, such as machinery, large stone blocks, structural steel and iron, bridge iron and girders, steel trusses, etc., require specially reinforced flat cars. These articles illustrate the variety of requirements which the carrier must meet in order efficiently to perform its service of transporting them. In these instances above noted the nature of the article itself determines the class or kind of equipment necessary.

Still another requirement falls upon the carrier, not necessarily incumbent upon it by law, but nevertheless

necessitated by the force of competition. If the carrier once assumes to furnish the facilities for the handling of a certain traffic, the law requires they shall be furnished to all shippers entitled thereto—that is, it requires the furnishing of those facilities for receiving, loading, unloading, interchanging, and delivering or storing of property tendered to the carrier for transportation. Also, in the transportation of live stock, the carrier must not only provide the cars in which to transport the animals, but must also provide the facilities, such as chutes, yards, runways, into and through which to load and unload the animals, and to water and feed in transit, and must also provide the means or labor to load and unload.

United States vs. Union Stockyards Co., 226 U. S. 286.
Covington Stockyards vs. Keith, 139 U. S. 128.

Likewise facilities must be furnished for icing refrigerator cars, for inspecting and ventilating cooled shipments, for the proper setting of cars for car loading, for weighing, for delivery of carload shipments, for storage of property pending delivery, for treatment of certain commodities in transit, and for affording the necessary service in preserving the condition and quality of commodities in transit where the carrier undertakes their transportation.

Again, the methods of handling raw material at large manufacturing centers or plants have influenced the construction of cars and equipment. In the iron and steel reducing plants in the Pittsburgh and other like districts the unloading of incoming cars of ore is performed by special machinery, which lifts an entire car from its trucks, raises it, dumps it, and returns it to its trucks. Hence, these ore cars are so constructed that they are easily demountable. In other plants the unloading of ore, coal, sand, and like commodities, by shoveling, would be

too expensive and slow a process, and self-dumping cars have been constructed to meet this requirement. The so-called hopper-bottom cars are cars used for hauling this class of commodities and equipped with movable bottoms for dumping purposes.

(2) Private Equipment. Up to as late as 1876 the car equipment of the carriers consisted of box cars, flat cars, and an inadequately small number of slatted or stock cars. The furnishing by the carriers of special cars, such as refrigerator, tank, and of other designs suitable for special commodities, was strongly resisted by the carriers, upon the ground mainly that the carrier should not be required to expend large sums of money in equipment designed to transport products then in the experimental stage of manufacture, and for which the carrier would have no use if transportation of the special product should fail, or at those times of the year when the special products did not move.

The result of this attitude of the carriers was the acquisition and ownership by individual shippers of freight cars suitable for their particular commodities. Later special equipment was constructed and furnished by private car companies, and for many years the fast freight lines operated their own equipment as private concerns. Manufacturers of foodstuffs, and more particularly the packing-houses, became the owners of a large number of refrigerator cars. These cars were adaptable to the transportation of dressed beef, dairy and packing house products, fruits and vegetables. The traffic of the packing-house owners became so extensive and influential with the carriers that the latter made contracts with the owners for the use of private refrigerator cars in the transportation of fruits and vegetables when such cars were not engaged in the transportation of meat. Private car companies

came into existence in the early eighties, and they furnished special equipment for live stock, perishable property, and foodstuffs, for the use of which the carriers paid a charge usually based upon car mileage. With the development of the oil industry the old wooden tanks and barrels were done away with by the larger companies and a large cylindrical iron tank car was put in use, under an arrangement with the railroads for its hauling. This class of car eventually became the cause of serious charges of unjust discrimination by the carriers, since only the large oil companies could afford to own and operate them.

Other commodities and articles necessitating unusually strong or roomy equipment were the cause of individuals owning and using special equipment for their transportation.

Large coal mining companies own and operate a large number of private coal cars, not so much because of the carriers' failure to furnish sufficient coal cars, but to insure to the coal companies an adequate supply of coal cars in times of shortage in the carriers' car supply.

Of late years the carriers have provided themselves with special cars of the nature of those owned and operated by individuals. This is now a duty cast upon the carrier by the Act to Regulate Commerce by force of its requirement to furnish equipment suitable for the requirements of any traffic the carrier undertakes to handle, upon equal and reasonable terms to all shippers, so that the shipper who can not afford to own his cars may demand and receive from the carrier suitable equipment for his products.

(a) While this is the recognized legal duty of the carriers, the railroads have sought by tariff provision to limit their obligations to furnish special equipment such as tank cars. In fact the question of the duty of carriers to furnish

tank cars was only recently passed upon by the Commission in the Paraffine Works case, in which the Commission required carriers subject to the act to furnish tank cars.

(See Chapter V. **Car Equipment and Supply.**—Private cars, Sects. 5-8, inclusive.)

This privately owned equipment is known as "special equipment or cars," and while it has been the source of bitter complaint because of its usage and treatment by the carriers in discriminating against producers unable to own such equipment, it has unquestionably been an important means of extending the industry and commerce of the country.

(3) System Equipment. System equipment of a railroad is that equipment which the railroad company owns and operates. Under the present methods of interchange of equipment between the carriers, the cars of one carrier may become scattered over the country and remain for months, and sometimes years, off the owning carrier's rails. Practically all carriers have restrictive rules governing the movement of their equipment off their own rails, to the end that such equipment will remain and be used upon their own lines. In some instances the restriction is as to the special classes of equipment only.

System equipment generally consists of box cars, of various types suitable to the traffic of the roads, flat cars, coal cars, gondola cars, slatted cars, such as coke cars, single and double deck live stock cars, poultry cars, refrigerator cars, ventilator cars, patent bottom dumping cars, hopper bottom cars, and such special equipment as may be required by any particular kind of traffic handled by the carrier. For instance, a road transporting heavy bridge and structural steel may have short trussed and

reinforced flat cars suitable to the needs of the steel traffic.

Shippers desiring to ascertain the car equipment of any railroad company may do so by referring to the Official Railway Equipment Register, a publication giving the serial numbers, classes, designs, if special, dimensions, capacities, age, and numbers in each class or kind of cars owned by each railroad company in the United States, Canada and Mexico.

§ 5. An Analysis of the Service of Transportation.

In speaking of "transportation service" in its present stage of development, one usually contemplates a service which begins at the time the shipper delivers his shipment to the carrier and ends when the carrier has delivered it to the receiver, even though such a service may include the setting of a car at the consignor's factory door to receive his shipment and the placing of the same car at the consignee's industrial plant for the unloading of the shipment. In the broadest sense, such is the service which the carrier must render, and in which the law discountenances discrimination. Thus, the "transportation service" must be defined to embrace the receipt by the carrier of a shipment either at its depot or upon its or a privately owned track, the movement in the case of the carrier to the town or city of destination, and the delivery of the shipment by the carrier either at its depot at destination or upon its or a privately owned track. And the carrier generally publishes its rates to cover such a service, except that where any material or unusual amount of switching or terminal service is involved, either at point of origin or destination, the carrier sometimes exacts an additional charge therefor.

This service of transportation is the result of a process of evolution, both in transportation and commercial neces-

sities. It is susceptible of division into a primary service of carriage, secondary or incidental services, and accessorial, additional or contributive service.

The service of carriage is the movement by the carrier of shipments from its depot at origin to its depot at destination; the secondary service is such switching and terminal treatment of the shipment as may be necessary either at origin, en route, or at destination; and the accessorial service is the contributory or additional service, which goes to make up the full transportation of the shipment, such as elevation, refrigeration, ventilation, and milling in transit, feeding in transit, compressing in transit, cleaning or grading or separating in transit, icing in transit, storage, transferring, draying, reconsignment, etc. All these are necessary and a part of the transportation of foodstuff, live stock, meats, grains, cotton, lumber, ores, and other special products, making up the material railroad tonnage in the country's commerce. It is optional with the carrier, in the law, whether it make an additional charge for some of these accessorial services; but whether it make a charge or not, the law makes it obligatory upon the carrier to treat all shippers upon an equal footing in the granting and rendering of such contributory service. Of course, it must be understood that if the carrier undertakes to transport articles which require additional or accessorial service in transit, in order that they may be transported and their commercial qualities preserved, the carrier assumes the duty of providing and furnishing such additional or accessorial service as the particular commodity requires; but the carrier may either charge a higher rate or exact an additional charge for the unusual service, the risk its assumes, and the more expensive service it renders.

It is the mandate of the regulating laws governing

interstate carriers that the service of transportation proper must be charged for, the only exceptions permitting free transportation being specifically set forth in the franking or pass sections of the act, and in that section which permits carriers to deal with municipalities or political subdivisions of states on traffic for such divisions, and with grange associations in instances of need, etc. It has been the practice of carriers generally throughout the country to extend to shippers a certain amount of free service of the nature heretofore mentioned in this section. In the recent Five Per Cent Case, in which the eastern lines sought to advance their rates and charges because of inadequate revenues, it was strongly urged by commercial interests that the carriers might greatly enhance their revenues by discontinuing free incidental services, and investigations were conducted by the Interstate Commerce Commission, notably the "Car-Spotting Case," in an effort to determine to what extent these free services depleted the railroad revenues. The effect of these investigations is not yet appreciably effective, although the Commission condemned the granting of free service, where the effect of its cost to the carrier was not equitably distributed among all classes of shippers. In some instances immediate action on the part of the carriers was had, discontinuing free service and a proper charge instituted in lieu thereof. The effort is more or less general at the present time toward doing away with most of the free service.

The discontinuance of free incidental services was urged by a special attorney for the Commission and not by the commercial interests, and was strongly urged by the Commission in its majority report as one means by which the carriers might increase their revenues. This suggestion of the Commission resulted in the "Car Spotting" and "Trap Car" tariffs, subsequently suspended and finally

denied by the Commission after a comprehensive investigation. The denial was based on the tariffs as published, but the inference from the report, so far as "trap cars" were concerned, was that if the tariffs could be published so as to avoid unjust discrimination something might be permitted in the way of "trap car" charges; but the so-called "spotting" service was found to be a part of the transportation service covered by the published rate.

The present system of regulation of interstate transportation defines the service of transportation to include all mediums of transportation, the physical carriage, all facilities, instrumentalities, persons, and agencies connected with the receipt, transportation and delivery of persons or property.

(1) The Service of Carriage. Before the present stage of development in the transportation service of the railroads of the United States, the contract of shipment provided for carriage over the line of the carrier from its depot at the point of origin to its depot at the point of destination, and such, strictly speaking, is the obligatory service of the common carrier at common law. The carriage of the shipment from the shipper's residence or factory to the carrier's depot, and the taking of the shipment from the carrier's depot at destination to the home or business houses of the consignee, were entirely incumbent upon the shipper and receiver of the freight and no part of the carrier's service. The tremendous development of the country industrially and commercially, and the consequent complicated development of industrial tracks and terminal facilities and the growth of carload traffic, have all combined to extend the simple service of carriage of former years to a service that now reaches, in many instances, from the door of the consignor to the door of the consignee.

(2) **The Secondary Service.** That the shipper may load his traffic into cars at his factory or that the receiver of the freight may unload it at his industrial plant, has necessitated the construction and maintenance of extensive and costly terminals with tracks and facilities for switching cars to and from industries and factories, including an expensive secondary service performed by the carrier. Moreover, there is the class of shippers who are not so situated that they may enjoy the use of tracks or switches to the doors of their factories or business houses, and the carrier provides public team tracks upon which such shippers may load and unload their carload shipments. While these team tracks relieve the congestion at the carrier's freight depots, additional service must be performed in setting on, and pulling cars from, public team tracks. This service of switching cars to and from public team tracks and industrial tracks and sidings is secondary and incidental to the movement or carriage of the shipments from depot to depot of the carrier, and the law sanctions the right of the carrier to impose an additional charge therefor, or so to construct its rate from origin to destination, as to include compensation for such secondary service.

While the law might sanction an extra charge for switching to or from an industrial track, under conditions requiring an unusual extra service incident to a long haul off the main line or away from the main yards, the car spotting case definitely included the placement of a car for loading or unloading on an industrial track of the line having the road haul, as a part of the transportation included in the rate paid for the transportation. And this is particularly true of the "team track" service, because team tracks are the only depots of the carriers for carload traffic moving under carload rates, which, with the exception of live stock, require the owner to load and unload.

(3) Accessorial Service. Accessorial services are those services rendered by the carrier, or in some instances rendered partly by the carrier and partly by the shipper, in addition to the service of carriage and the secondary service of switching, etc., which contribute to and complete the full service of transportation of an article, having regard not only to its physical movement from one point to another, but to the preservation of its physical condition and the requirements of commerce. In short, they are those services which contribute to and make the transportation service complete in its more modern commercial significance. These accessorial services are as many and varied as the natures of particular commodities, and the geographical and climatic conditions at intended markets necessitate. The distinction is sometimes claimed that many of these accessorial services are simply privileges extended to the shipper, such as the stopping of a car in transit to complete loading, milling-in-transit, inspection, etc., but they are services incidental to the service of carriage and its secondary service within the present day meaning of the term "transportation," and include many privileges and allowances in addition to the legally published freight rates which must be taken into consideration in making shipments.

The more important and generally accorded accessorial services are herewith briefly reviewed. These include the allowances, special freight services or privileges which are accorded interstate shippers and which, under the law, must be published in the tariffs of the common carriers.

Many of these more important services are discussed at greater length in other sections of this volume, but are briefly referred to in the present resumé in order to present a complete record of all of the generally accorded services of this character.

Special facilities for weighing may render the weighing of articles an accessorial service, but primarily the weighing of shipments is a part of the carriage, in that the weight is the basis upon which the transportation charge is imposed.

Incidental to the movement of carload shipments is the application of demurrage, or the imposition of charges in the nature of penalties for the retention of cars beyond a specified loading or unloading period. (For complete definition of "demurrage" see "Special Freight Services Allowances, and Privileges," Part 2, "Demurrage Charges and Rules."

While, strictly speaking, demurrage should not be considered an accessorial service, it is included in the following classification for the purpose of briefly reviewing all special services which in any way effect the rate or the shipment. These special services include:

1a. Back—Or Indirect Hauls. When shipments are reconsigned or diverted it sometimes happens that the point at which the shipment is reconsigned or diverted is not on a direct line between the point of origin and point of final destination, or, in other words, the shipment is out of its natural route and the carrier permitting the reconsignment is compelled to perform a longer haul than it ordinarily would be called upon to do if the shipment were reconsigned at a point directly intermediate to the point of final destination. Such a service is called a back—or indirect haul.

Tariffs permitting reconsignment usually provide for a charge on a mileage basis for such back—or indirect hauls. The following extract is taken from a carrier's reconsigning tariff and gives an example of the manner in which back—or indirect haul charges are assessed: "If reconsignment causes a back—or indirect haul an additional charge for extra service will be made as follows, except

when reconsignment to a point within the switching limits of the station to which shipment was originally billed, in which case no charge for extra service will be made."

	Cents per 100 lbs.
For 20 miles or under	1
For 30 miles and over 20 miles	1½
For 40 miles and over 30 miles	2
For 50 miles and over 40 miles	2½
For 60 miles and over 50 miles	3
For 70 miles and over 60 miles	3½
For 80 miles and over 70 miles	4
For 90 miles and over 80 miles	4½
For 100 miles and over 90 miles	5
For 120 miles and over 100 miles	6
For 140 miles and over 120 miles	7
For 160 miles and over 140 miles	8
For 180 miles and over 160 miles	9
For 200 miles and over 180 miles	10

Back-hauls or out-of-line hauls are sometimes permitted in connection with shipments accorded transit privileges. The Commission has stated, "back-haul is contrary to the purposes of transit and should generally be permitted only to meet unusual situations and when to do so does not result in unjust discrimination or other violation of the law."

2a. Bedding of Live Stock. In making shipments of live stock from stock yards or loading points it is customary to provide bedding for the animals. At most of the large stock yards bedding for stock cars will be furnished by the stock yard companies and a charge made for the service. This charge is in addition to the rate and an expense against the shipper. For example, at the Chicago Union Stock Yards a charge of $1.00 per car is made for bedding single deck cars and $1.50 for double deck cars.

3a. Bulkheading of Cars. (See Grain Doors and Bulkheading of Cars.)

4a. Burnetizing. (See Creosoting or Burnetizing.)

5a. Caretakers in Charge of Property. Caretakers usually accompany shipments in order to properly look after the shipments in transit, such as to water and feed live stock, attend to stoves placed in cars containing perishable shipments, feed and water live poultry in transit, or for any other purpose wherein the services of a caretaker may be required.

When caretakers accompany shipments they are usually furnished with free transportation, and in some instances a free return pass is given. The rules permitting caretakers to accompany shipments are usually published in exceptions to classification or the tariffs of the individual carriers.

6a. Car Lining. In order to protect shipments from frost during the winter season it is necessary to use "lined cars." The lining used is generally a felt, or a heavy paper. This class of equipment is usually used in shipping potatoes.

The protection of Northern potatoes and produce from frost during cold weather can only be secured by the use of heated or lined cars. The ordinary box car or the refrigerator car will not afford the protection that the traffic requires. There is, therefore, no demand for ordinary box cars for this traffic, and while refrigerator cars may be used in the early part of the season or after the season is well advanced, they can not be substituted for the heated or lined cars during extremely cold weather.

The rules and regulations governing the lining of cars are usually published in tariffs containing the rates, or in special circulars or exceptions issued by the individual carriers and the agents of the various committees.

7a. Car Service. (See Demurrage.)

8a. Cartage. Carriers do not call for nor deliver less than carload shipments at the shipper's or receiver's home or place of business, but in handling carload traffic the car itself is set for loading or unloading on the shipper's switch or on public team track. In these days of general interchange of traffic between railroads within terminals or at junction points it is uncommon for a transfer of goods in transit to be made by wagon. However, at some of our large terminals, like Chicago and New York, rail carriers maintain "fleets," also wagons and trucks for the purpose of making transfer of package freight between rail and water lines having no junction depot. The question of cartage necessitated by wrong delivery of carload shipment by carrier is a subject that often enters into the work of the various claim departments of the railroads and must be handled in accordance with the law.

9a. Changing Destination. (See Reconsignment.)

10a. Cleaning and Disinfecting Cars. It is sometimes necessary to have cars for the transportation of live stock cleaned and disinfected. This work may be done either to comply with federal, state, county or municipal regulations, or on the order of the shipper. When such regulations require cars which have been or are to be used in the transportation of live stock or any shipment in which live stock is included, to be cleansed and disinfected, or when shipper orders cars disinfected, a charge is usually made by the carrier to cover the cost of disinfecting and cleaning. This charge must be in accordance with the law and provided for by tariff.

11a. Concentration. There are various commodities which are allowed concentration privileges, such as cotton, butter and eggs, dressed poultry, etc. For example: Local or concentrated cotton is assembled at the compress point

for storage, weighing, patching, grading, etc., which services are in addition to compression. Such cotton moves to the compress point from designated points, under a local bill of lading, which is surrendered on arrival at the compress. The charges are there paid and the cotton is delivered into the custody of the compress for the owner. It remains in the compress warehouse on an average of about fifteen days. When it is ready for shipment to destination the warehouse receipt is delivered to the carrier, a new bill of lading issued, and an account of inbound and outbound cotton taken, and the cotton is sent forward at the through rate in effect from point of origin to the new destination, and a refund made to the shipper of the local charges for the original movement. On page 461, 32nd I. C. C. reports, it is stated that concentration at various points of large quantities of cotton, in order that it may be sorted into lots of the same grade, is a commercial necessity.

Butter and eggs are usually concentrated for the purpose of assembling less-than-carload quantities at a certain point, and reshipping in carload lots, the carload rate being charged from the concentration point, or point of origin, to ultimate destination.

When shipments are moved from point of origin to the concentrating point, full less-than-carload rates are collected. When the butter and eggs are reshipped from concentration point a refund through claim is made on the less-than-carload shipments moving from original point of shipment to point of concentration. No refund will be made on weight into concentration point in excess of the outbound weight, and in the event that the carload rate from point of origin is higher than from concentrating point to final destination, charges should be assessed from the concentrating point at the higher of the two rates. The refunds on the in-bound movement are usually made

on the basis of a mileage rate, for example: One to 75 miles, inclusive, 10 cents per cwt.; 76 to 175 miles, inclusive, 20 cents per cwt.; 176 miles to 200 miles, inclusive, 30 cents per cwt.; over 200 miles, local rates.

12a. Creosoting or Burnetizing. Lumber and other forest products are stopped in transit between point of origin and point of destination and put through a creosoting or burnetizing process. The treated lumber is then forwarded to ultimate destination and the through rate from point of origin protected. A charge is usually made by the carrier on whose rails the stop-off is permitted for the privilege.

13a. Demurrage—Car Service. Demurrage is the practice of charging a nominal rental per day for the detention of a car beyond a specified "free time" for loading or unloading. This practice for years was a subject of bitter contention between the carriers and shippers, and it must be admitted that many practices were indulged in by the carriers under the guise of "demurrage" that were not in accord with the present day order of demurrage regulations and charges. The subject has been extensively dealt with by the Interstate Commerce Commission and by associations representing both carriers and shippers, and today we have a so-called national code, besides numerous state codes, of demurrage regulations. A persistent movement towards uniformity in the national and state demurrage codes has resulted recently in a practical degree of harmony in the manner of computations of demurrage time and rates of charge therefor.

Three distinct plans of demurrage are in effect in different parts of the country: (1) Straight demurrage; (2) average plan; (3) reciprocal demurrage.

Under the straight plan of demurrage no allowance or credit is made to the shipper who releases equipment

before free time has expired, but charges are made and collected on all equipment detained beyond free time.

The average plan permits an average of time for the releases before free time has expired; and the detentions beyond free time for a given period, usually a month.

The reciprocal plan requires the payment of a specified amount to the shipper, proportioned according to the time cars are released before the expiration of the free time period.

14a. Dipping in Transit. Live stock affected with contagious diseases, or which have been exposed to contagious diseases, are oftentimes stopped in transit for the purpose of dipping and disinfecting.

The following are extracts from the regulations of the United States Department of Agriculture, covering the dipping or disinfecting of live stock in transit:

"Section 9. Paragraph 1. The dips at present permitted by the department for the treatment, under official supervision, of cattle affected with or exposed to scabies are as follows:

"Lime-sulphur dip made in the proportion of 12 pounds of unslaked lime (or 16 pounds of commercial hydrated lime—not air-slaked lime) and 24 pounds of flowers of sulphur or sulphur flour to 100 gallons of water.

"Nicotin dip containing not less than five one-hundredths of 1 per cent of nicotin, provided there is added thereto, to prevent reinfection, 2 per cent of flowers of sulphur or sulphur flour.

"The dipping bath should be used at a temperature of 100° to 105° F., and must at all times be maintained at a strength of not less than 2 per cent of "sulphid sulphur" in the case of the lime-sulphur dip, and not less than five one-hundredths of 1 per cent of nicotin in the case of the

nicotin dip, as indicated by the field tests for such baths approved by the Bureau of Animal Industry.

"Paragraph 2. A proprietary brand of lime-sulphur solution or nicotin solution may be used in official dipping only after specific permission therefor has been issued by the Bureau of Animal Industry. No dip other than the lime-sulphur or the nicotin dip will hereafter be given department permission for use in official dipping of cattle for scabies unless it has been shown to the satisfaction of the Bureau of Animal Industry (1) that the strength of the bath prepared therefrom may be satisfactorily determined in the field by a practical portable testing outfit; (2) that under actual field conditions the dipping of cattle in a bath of definite strength will effectually eradicate scabies infection without injury to the animals dipped.

"By modifying Section 5 of Regulation 4 to read as follows:

"Section 5. Paragraph 1. The dips at present permitted by the department for the treatment, under official supervision, of sheep affected with or exposed to scabies are as follows:

"Lime-sulphur dip made in the proportion of 8 pounds of unslaked lime (or 11 pounds of commercial hydrated lime—not air-slaked lime) and 24 pounds of flowers of sulphur or sulphur flour to 100 gallons of water.

"Nicotin dip containing not less than five one-hundredths of 1 per cent of nicotin, provided there is added thereto, to prevent reinfection, 2 per cent of flowers of sulphur or sulphur flour.

"The dipping bath should be used at a temperature of 100° to 105° F., and must at all times be maintained at a strength of not less than 2 per cent of 'sulphid sulphur' in the case of the lime-sulphur dip, and not less than five one-hundredths of 1 per cent of nicotin in the case of the

nicotin dip as indicated by the field tests for such baths approved by the Bureau of Animal Industry."

15a. Diversion. (See Reconsignment.)

16a. Drayage. (See Cartage.)

17a. Dunnage. Dunnage consists of blocking, bolsters, racks, standards, stakes, strips, bearing pieces, or supports, used to retain the load on the car or to reinforce equipment. There are many cases where an allowance is made for dunnage used on shipments, although the tendency of late has been to curtail these allowances. For an example the Western Classification provides as follows: "An allowance not to exceed 500 pounds will be made for temporary blocking, racks, standards, strips, stakes, or similar bracing, dunnage or supports not constituting a part of a car, when required to protect and make secure for shipment property on flat or gondola cars upon which carload ratings are applied. Such material must be furnished and installed by the shipper and at his expense. Carriers will not be responsible for the removal or damage to such bracing, dunnage or supports and it will be optional with them to remove or return to shippers if not taken by consignees." As a general rule an allowance of 500 pounds is made for stakes on shipments of lumber loaded on flat or gondola cars when such stakes are necessary to properly protect the lading. The rules governing this allowance are usually found in the tariff which contains the rates on the shipment.

Generally speaking, the dunnage rules are carried in the Classification or Exceptions to Classification.

18a. Elevation. This is a form of accessorial service rendered by carriers for the purpose of allowing the drying, sorting, grading and storage of grains. When a part of the transportation service includes elevation an allow-

ance to cover the cost of such service is included in the rate.

There are two kinds of elevation, one of which may be termed transportation elevation, consisting of the passing of the grain through an elevator for the purpose of transferring it from car to car and obtaining its weight; and commercial elevation, which involves various processes in the treatment of the grain itself, like cleaning, mixing, clipping, drying, etc. The first sort of elevation is an incident to the transportation of the grain, the second to the merchandising of the grain.

19a. Fabrication in Transit. Fabrication in transit refers to the manufacturing of structural and bridge iron or steel from the mill at an intermediate point between point of origin and final destination, the shipment being stopped to be reworked or fabricated.

Shipments are billed to the transit point or point of manufacture at full tariff rate, and, upon surrender of the paid freight bills covering inbound movement, representative outbound movement is billed from the transit point to final destination at the remainder of the through rate (on the manufactured product), in effect on the date of the initial shipment, plus a charge, usually 1½ cents per 100 pounds for stop-over or transit privilege, except where the sum of the local rates is charged, in which case billing out will be at local rate from transit point. The way-bills from transit point must give full reference to inbound billing to this point, including point of origin, date of way-bill, rate, weight and charges. In fact, all rules provided for in tariffs permitting fabrication must be closely adhered to and shipments handled accordingly. These rules are usually published in the tariffs of the individual carriers, permitting fabrication transit.

20a. Feeding in Transit. This service is usually per-

formed in connection with shipments of live stock. For example, a carload of sheep is billed from point of origin to a fattening point and fed for a period of from six months to one year, the duration of time depending entirely on the terms of the tariff, and subsequently forwarded from the feeding point to market and sold.

The inbound shipments are usually way-billed to feeding stations at published tariff rates to such points, the outbound shipments being forwarded from such stations to final destination, at balance of through rate in effect at date of shipment from point of origin. Any weight of the outbound shipments, in excess of the inbound weight or minimum weight, based on the size of the car used for the inbound shipment, is charged for at the local rate from feeding station to final destination, in effect at the date of the outbound shipment.

When it is necessary to stop live stock, while in transit, for feed and water, a charge is made for this service, which may be performed either at an intermediate station, at final destination, or at the various stock yards throughout the country.

21a. Freight Transported by Passenger Train Service. There are commodities on which the owners require passenger train service, such as silk and high class live stock, including race horses and exhibition animals. Service of this nature is usually charged for on the basis of 200 per cent of the rate by freight service.

22a. Grain Doors and Bulkheading of Cars. For loading certain commodities in bulk, grain doors and bulk heads are used at all times of the year, the former to retain the load in the car and prevent leakage therefrom and the latter to divide the car into bins.

Bulkheads are temporary barriers of boards which extend across the interior of the car on either side of the

door openings. They convert the car into two bins, one at either end, leaving a free space between doors. The height to which bulk heads are built varies with the necessity of the shipment.

Grain doors are usually made in sections 18x24 inches wide, the boards composing them being cleated together and long enough to span the doorway of the car. From 6 to 8 sectional doors are required for a car. There is no uniformity with respect to the special equipment of this character furnished by the carriers. Some of them furnish sectional doors, boards, lath and burlap or paper especially designed for the purpose. Others furnish sectional doors, lumber and paper, and others furnish nothing but sectional doors and lumber.

23a. Hay for Packing and Protection of Property. In transporting certain commodities, particularly during the winter season, it is necessary to use hay, straw, sawdust or other similar material to prevent the shipment from freezing, and, in these cases, the shipper is allowed to place hay in the car with the shipments for their protection. For example, under the Western Trunk Line rules, with shipments of beer in carloads, the shipper may load 2,000 pounds of hay, straw, sawdust or other preservative to protect the property from freezing.

24a. Heated Car Service. In order to protect shipments from freezing during the winter season cars containing potatoes or other commodities of a perishable nature are equipped with stoves in which a fire in maintained for the protection of the property. With such shipments a caretaker usually accompanies the car, for the purpose of attending to the fire and preventing damage to the commodity shipped by reason of frost or overheating. An allowance is usually made for the weight of the stove and

fuel which must, in no case, reduce the weight of the shipment below the minimum provided for by the tariff.

25a. Lighterage and Floatage. Lighterage consists of the handling of freight by lighter from one pier to another, from railroad terminals located at piers to other piers and industries, or from piers to steamers.

Lighterage differs from floatage, as the latter includes delivery of the car and lading, while lighterage includes delivery of the lading only. This system of delivery of freight is used in New York harbor and other places similarly located.

26a. Loading and Unloading. The general rule throughout the country is that the owner, or his proper representative, is required to load or unload all freight carried at carload rating. Heavy and bulk freight carried at less-than-carload rating, that cannot be handled by regular station employees of the carrier or is delivered at stations where the carrier's loading and unloading facilities are not sufficient to handle such freight must be loaded or unloaded by the owner of the property, or his proper representative.

27a. Marine Insurance. It frequently happens that a rail carrier forms a part of a water-and-rail route over which a through bill of lading is issued. As the property, while in movement over the water portion of the route, is subject to loss from the perils of the sea, marine insurance is taken out to insure the shipment against such loss.

28a. Market Privileges. To illustrate the application of market privileges we will take a shipment of live stock originating at Ft. Worth, Tex., and destined to Chicago, Ill. The shipper desires the shipment to go through St. Louis with market privileges at that point, and the car is therefor stopped in transit at this point, and if the market

is satisfactory to the owner, the live stock sold. If the market at St. Louis was not satisfactory the car could be forwarded to Chicago and sold, and the through rate from point of origin to Chicago protected. In order to permit the shipper this privilege the necessary rules would have to be published in tariff form, and on file with the Interstate Commerce Commission at Washington, D. C., providing, of course, that the shipments are interstate in their movement. If the St. Louis market is taken advantage of then the shipper or consignee pays the charges on the basis of the rate from point of origin to St. Louis, while if the shipment is marketed at Chicago the Chicago rate is assessed.

29a. Mileage and Rental of Private Cars. There are numerous commodities transported requiring special equipment, such as high-priced live stock, live poultry, etc. This special equipment is mostly controlled by corporations or private car lines who lease their equipment to shippers or consignees for handling their particular traffic. For example, the Arms Palace Horse Car Company owns a number of horse cars specially equipped with stalls, water tanks, feed mangers, etc., and these cars are used in the transportation of high-priced horses and cattle. The rental on horse cars is usually figured on a mileage basis, the rate used depending on the size of the car, the charge on a 48-foot car being as follows: 100 miles or less, continuous trip, $10.00; 101 to 300 miles, continuous trip, $12.00; 301 to 500 miles, continuous trip, $15.00; 501 miles or over, continuous trip, 3 cents per mile, loaded distance.

The large shippers, particularly those whose business requires special equipment, such as packers, oil refiners, etc., own and ship their goods in private cars. By following this policy the owners procure the two-fold advantage of having their cars earn mileage at a high rate of speed,

both when empty and under load. Private car movements as a rule represent a highly expedited service.

Rules for the equalization of empty and loaded private car mileage are in effect and result in materially lessening the transportation costs to the owners of private car lines. The rules governing such mileage are provided for in the various classifications.

30a. Milling in Transit. (See Transit Privileges.)

31a. Overloading of Cars. The general rule regarding the loading of cars permits a 10 per cent margin above their marked capacity. When cars are loaded in excess of this margin they are considered overloaded and a transference of a part of the shipment is usually required.

32a. Peddler Car Service. In this service the car is iced and loaded by the packer with fresh meats and packing house products in whatever quantity and proportion desired. The car is then transported to the first unloading point, where it is opened and a portion of the contents removed. From thence it goes to the next unloading point and so on to its final destination. The work of unloading is performed by the employees of the carrier in the same manner that local freight is unloaded at the various stations, and no special or additional storage facilities are provided. The initial icing is by the packer, and if subsequent icing is needed the packer pays for the ice actually used.

33a. Pre-cooling. Pre-cooling is entirely different from refrigeration and is employed in the shipment of citrus fruit. Under this method the fruit is brought from the orchard to the packing house and is at once packed and placed in a cold room, where the heat is gradually extracted. When the car is to be loaded it is brought to the packing house connected with the cooling room and thoroughly cooled. The fruit is then packed into the car,

not with spaces between the boxes, but in solid mass, which incidentally permits an increase in the load of from five to six tiers. The bunkers are filled with ice, large cakes being specially prepared for the purpose and great care being taken to see that the bunkers are thoroughly filled. After all this has been done the car is sealed and hauled through to destination, without opening the bunkers and without unsealing the car.

34a. Racking and Stripping of Refrigerator Cars. In the transportation of meats and other perishable property it is sometimes necessary to furnish boxes, hooks, racks, stilts and stripping for the interior of refrigerator cars. These articles are usually furnished by the shipper and at his expense, and the tariffs provide for their free return at original point of shipment when they are taken from refrigerator cars at destination.

35a. Refrigeration. The service of refrigeration includes the furnishing of cars specially equipped with ice boxes or bunkers and generally known as "refrigerator cars." Ice sufficient to protect shipments of a perishable nature is placed in the boxes or bunkers at point of origin, and re-iced at icing stations en route, for the proper protection of the shipment. Such commodities as butter, dressed poultry, eggs, fresh meats, packing house products, fruits, vegetables, beer, etc., are usually shipped in such manner.

Sometimes refrigeration consists of the packing of perishable commodities in ice, in boxes or cases, loaded in ordinary box cars, but the term has general reference to the service rendered with refrigerator cars.

The charges for refrigeration service are published in some instances in exceptions to classifications, or in special circulars issued by the various committees; also in the

tariffs naming the rates issued by the various committees and the individual carriers.

Where the refrigerator cars are operated on regular schedules they are iced and re-iced by the carriers, and at their expense.

36a. Reconsignment. In the twenty-first I. C. C. reports, page 258, it is stated that reconsignment, as technically understood, is a privilege extended by carriers to shippers, under which goods may be forwarded to a point other than their original destination without removal from the car and at the through rate from the initial point to that of final delivery. This application to the shipment of the through rate, which is often less than the sum of the intermediate rates, in and out of the point of original destination, is the distinctive feature of reconsignment and separates it from reshipment which is otherwise quite similar.

Any consignee has the right to reship goods received by him without removal from the car upon payment of the freight charges to that point, the goods going forward under a new transportation contract. This is an incident of the transportation facilities offered, while reconsignment is a privilege that exists only under the permission granted in the tariff and that must be exercised only under the rules and conditions there laid down. When the through rate is equal to the sum of the intermediates in and out, reconsignment and reshipment differ only as to the rules applicable to them.

Reconsignment is allowed under the tariffs of the several carriers in two distinct classes of cases. A shipment while in transit to a given point may be diverted to another market, provided the order is received before the car has passed the proper junction point. A modification of this privilege is seen where the final destination of a shipment

is not announced by the shipper, until a car has arrived at a designated junction. In most cases cars for reconsignment are so designated at time of shipment, and, upon arrival at the original destination, they are placed in storage or "hold" tracks, awaiting the reconsignment order. When the terminal tracks are congested the carrier often, as a matter of convenience, holds them at some point short of destination, and provided this involves no disadvantage to the consignee, such holding is constructively equivalent to holding at destination.

The primary economic advantage of reconsignment is found in the increase in the fluidity and regularity of the movement of commodities; there is an important elimination of economic waste in the reduction of the handling of goods between the producer and the consumer, celerity of movement is increased, the direction of commodities to the point of most active demand is facilitated. In other words, reconsignment increases the efficiency of transportation facilities in performing their most important function of bringing together supply and demand. The shipper of perishable products is able to divert his shipment from a market already overstocked, thus often converting a prospective loss into a gain; he is enabled to take advantage of his latest possible market information as to market conditions. Similar advantages are seen in the movement of lumber and grain and other commodities of universal necessity.

In some instances the carriers exact a charge for the privilege of reconsigning shipments in transit, while in others no charge is made, the question of charges depending entirely upon the application of the tariff permitting the privilege. A reconsignment charge is a sum fixed to cover the extra service of switching, telegraphing, messenger and clerical hire, delay to equipment, etc., incident

to a change enroute of the destination of a carload shipment or to a change of destination after the car has reached the point to which is was originally consigned.

The tariffs of some of the carriers define a reconsignment as follows: "A reconsignment is a service performed incident to the diversion of carload freight in cars, change of consignee, change of destination, or the holding of cars while in transit 'for orders,' where through or joint published rate from initial point of shipment to final destination is applied and shipment is forwarded to final destination intact and no portion of the contents may be unloaded or any articles substituted or added."

37a. Returned Shipments. During the last few years there has been a tendency on the part of the carriers to cancel many of the rates applying on returned shipments, such as those returned to factory for repairs or on account of being unsalable. Practically, rates in effect at the present time cover only reduced rates for returned empty carriers, such as ale, beer, beer tonic, mineral water and porter packages or empty drums, or cylinders used in the transportation of acids, ammonia, gas, oil, also empty bags and sacks, which are returned to the original shipper after being emptied of their contents, as many other rates formerly in effect covering return shipments have been cancelled.

38a. Salt for the Preservation of Perishable Shipments. On shipments of fresh meats and packing house products salt is sometimes used as a preservative. Where shipments are reiced at icing stations and salt is used a charge is made, usually on a basis of 40 cents per 100 pounds, which is in addition to the rate and also in addition to the charges made for ice supplied refrigerator cars at icing stations.

39a. Shrinkage. Allowances for shrinkage are made on

live stock, such as cattle and hogs, shipped from producing points to markets. This is made necessary by the fact that live stock, when confined in cars, actually shrink in weight between point of shipment and final destination. These allowances are usually published in exceptions to Classification or Live Stock Tariffs. Under the Western Trunk Line rules, for example, on certain traffic an allowance of 500 pounds per car for shrinkage on cattle is made, 300 pounds on hogs in single deck cars, and 600 pounds on hogs in double deck cars.

The allowance for shrinkage must in no case reduce the weight of the shipment below the prescribed minimum weight.

40a. Shippers Order Notify Shipments. This is a term applied to shipments consigned to the "order" of the consignor, with instructions to notify some designated party named in the bill of lading, and is an accessorial service granted by the carrier to the shipper in order to accommodate the latter in the distribution and delivery of his goods. The privilege of "order" shipments permits the shipper to insure the collection of the price of his goods upon delivery to the consignee. This service is universally granted by all carriers through the bill of lading form, known as "to order" bill of lading.

Agents of the carriers should not deliver shipments billed "shippers order to notify" without first having in their possession the original bill of lading properly endorsed.

41a. Stopping in Transit. The carriers operating in the various sections of the country permit shipments of freight, in carload lots, to be stopped at points intermediate between point of origin and final destination. In many instances the stopping of cars is permitted on carload traffic at points that are not directly intermediate between

point of origin and ultimate destination. These stops involve a "back—or out-of-line haul" and the carriers make a charge for the extra service performed. (See Back—or Out-of-Line Hauls in this chapter.)

Stopping in transit of freight is permitted to finish loading, or to partly unload, or for the purpose of taking advantage of transit or other privileges permitted by tariffs. Shipments of freight cannot be stopped in transit, unless under proper tariff authority. On interstate traffic such tariffs must be legally published and filed with the Interstate Commerce Commission in accordance with the law.

42a. Storage. The storing of freight in transit and at destinations where delivery can not be effected by the carrier has become not only a permanent practice on the part of the carrier, but a necessity arising out of the legal responsibility placed upon it for goods in its possession. The changing of the carrier's liability from that of common carrier to that of warehouseman, with a consequent decrease in degree of liability, has caused the railways to provide extensive storage facilities in the shape of warehouses, or to make working agreements with private warehouses for the storage of shipments remaining in their possession.

Storage may be of two general kinds: (1) Enforced storage arising out of the inability of the carrier to make delivery, thus causing the carrier either to store the goods safely in its own warehouses or to place them in storage with some public warehouseman; and (2) storage in transit as an essential part of the service of milling or manufacturing in transit accorded to articles requiring this service.

Such commodities as agricultural implements, farm wagons, apples and other commodities are, in a number

of cases, accorded a storage in transit privilege. Agricultural implements shipments are billed from the factories or producing point to a storage point, placed in a warehouse, and at a later date forwarded to other destinations, and the through rate from point of origin to final destination protected. A penalty of about 1 cent per cwt., with a minimum charge of $5.00, is usually charged in addition to the through rate.

When shipments are billed from the factory to storage point the charges are collected at the storage point on the basis of the local rate from point of origin to storage point, and when shipments are re-billed from storage point to final destination charges are assessed at the balance of the rate in effect from said point or points of origin on the date of the initial movement, subject to the following conditions:

"Before availing himself of the transit privilege the owner shall signify in writing to the agent of the inbound carrier at storage point such intention.

"Original paid expense bills covering inbound movement shall be surrendered to agent of the inbound carrier at storage point with the certified statement of owner that the commodity covered therein is the same as that reshipped, or its equivalent, and is entitled to the storage and re-forwarding privileges.

"Inbound movement from more than one point of origin includes only such points taking the same rate to the storage point and to final destination and moving over the same line or lines of railway. Upon reshipment of a non-transit character the owner shall surrender corresponding inbound original expense bills to agent of the inbound carrier at storage point for cancellation."

The usual storage period allowed is twelve months.

Apples are shipped from point of origin to storage points

and placed in cold storage for a period usually not to exceed twelve months, and are forwarded from storage points to final destination and the through rate protected. A charge of 1½ cents per cwt., with a minimum of $5.00 per car, is generally made for the storage privileges. This charge is in addition to the rate.

43a. Switching. Switching, in its simplest form, consists of moving cars from one track to another track, or to different positions on the same track. The switching service includes the moving of cars in the make-up and break-up of freight trains, setting of cars at freight houses or on team tracks, spotting cars on industrial switch tracks or interchange tracks, pulling cars from freight houses, team tracks, or industrial tracks, the movement of trap cars, and the general movement of cars within terminals and at junctions. Switching rates are made upon both flat per-car charge and on a basis of so much per 100 pounds or ton. Minimum revenue rules are established to govern the absorption of switching charges.

Switching service consists of the moving and placing of cars for loading or unloading purposes, or for interchange with connecting lines. From the standpoint of railroad operations, switching means much more than this, and would cover all movements of equipment other than train service movements.

44a. Temporary Partitions. (See Grain Doors and Bulkheading of Cars.)

45a. Trackage. A trackage charge is one made for the use of railroad tracks or side tracks. Under trackage agreements one carrier usually consents to permit another to move its cars or trains over its tracks, or to set cars on its tracks for delivery on a basis of a per car rate, or on a certain stipulated basis for the right to move locomotives

and cars over its tracks. Trackage rights are usually acquired by agreement between carriers.

46a. Track Storage. Track storage consists of a charge made for the detention of cars beyond the time specified in tariffs covering track storage on team tracks. This charge is in addition to demurrage charges and is made necessary by conditions which exist at a particular yard or yards in a city.

The following are extracts from a tariff covering track storage charges at Chicago:

Inner Zone.

"Rule 1. Cars held for loading, unloading, inspection, reconsignment or switching orders, on tracks other than private or industrial tracks of the Chicago & Alton Railroad, located north and west of 31st street, will be subject to track storage as per schedule below as shown in Outer Zone.

Outer Zone.

"Rule 2. Cars held for loading, unloading, inspection, reconsignment, or switching orders, when placed on team tracks outside of the zone described in Rule 1, but within a zone north and east of 48th avenue, will be subject to team track storage charges as per schedule below.

Track Storage Charges (Sundays and Holidays Excepted).

"1. No charge will be made for the first forty-eight (48) hours after car is placed. (Time will be computed from first 7:00 A. M. after placement, and after the day on which notice has been sent.)

"2. For next succeeding two (2) days the charge will be one dollar ($1.00) per car per day, or fraction thereof.

"3. For each succeeding day thereafter the charge will be two dollars ($2.00) per car per day or fraction thereof.

"4. No track storage charges will be assessed on shipments held in cars owing to weather interference, viz.:

"(a) When the conditions of the weather during the prescribed free time is such as to make it impossible to employ men or teams in loading or unloading, or impossible to move freight to or from cars without serious injury to the freight, the time shall be extended until a total of forty-eight (48) hours free from such weather interference shall have been allowed.

"(b) When shipments are frozen while in transit so as to prevent unloading during the prescribed free time. This exemption shall not include shipments which are tendered to consignee in condition to unload. Under this rule consignees will be required to make diligent effort to unload such shipments.

"(c) When, because of high-water or snow-drifts, it is impossible to get to cars for unloading or loading during the prescribed free time.

"This rule shall not absolve the consignee or consignor from liability for track storage charges if other similarly situated and under the same conditions are able to load or unload cars.

"The foregoing track storage charges apply in addition to the regular car demurrage charges."

47a. Transferring. Legitimate transferring consists of the movement of shipments from one car to another, either for the convenience or necessity of the carrier, or from one depot to another, or, in the case of terminal transfer, from one railroad to another railroad.

Transferring is well illustrated in the case of a shipment loaded into a car at New York City and destined to Chicago, Ill. This car is billed for through movement with-

out break of load or transfer. Suppose the car arrives at Harrisburg, Pa., in "bad order," or through the error of the forwarding agent at New York City the shipment has been loaded into a car whose movement was restricted to territory farther east than Chicago. In either event, the shipment must be reloaded into another car. It is the duty of the carrier to perform this transfer service without cost to the shipper or consignee.

48a. Transit Privileges. Transit privileges permit the moving of a commodity from point of origin to a point of manufacture and allows the manufactured product to be forwarded to its ultimate destination under the through rate or combination of through rates from point of origin to ultimate destination. In the thirty-first I. C. C. reports, page 576, the Commission defines transit as the passing through, or over, and implies that a commodity is first carried to a milling or manufacturing point where a commercial process is performed and the resulting product is moved on to other destinations. Among the important commodities given transit privileges is grain, which, under such a privilege, is moved from point of origin to milling point, and, after going through the milling process, the product or products are forwarded to other destinations and the through rate from point of origin to ultimate destinations protected.

Under transit tariffs covering grain, this commodity, including wheat, buckwheat, corn, kaffir corn, rye, oats and barley in carloads, may be stopped in transit and the following transit privileges allowed: Change of consignee, change of destination, change of ownership, bleaching, cleaning, clipping, drying, elevation, grading, inspection, malting, manufacturing, milling, mixing, repacking, sacking, shelling, storing and weighing. Seed may be stopped for cleaning and flour for blending and mixing. The privileges accorded these commodities must, however, only

be accorded when such privileges are permitted (on interstate traffic) by tariffs regularly published and on file with the Interstate Commerce Commission at Washington, D. C., and such tariffs must be constructed as provided by law.

Logs are also shipped under transit privileges and in such a case are transported from the forest where they are cut, to a milling point, and, after being cut into lumber, the product is forwarded to other destinations and the through rate from point of origin to ultimate destination protected.

49a. Trap or Ferry Cars. The term "trap cars" is applied to a car placed on the individual or private side track of an industry and loaded with less than carload freight, except perishable freight requiring refrigeration for movement to a freight station or transfer point for handling and forwarding of contents. It also relates to a car loaded with less than carload inbound freight, except perishable freight requiring refrigeration and bound from freight station to transfer point to an industry having an individual or private side track.

50a. Unloading. (See loading and unloading.)

51a. Ventilation. At certain seasons of the year some commodities, instead of requiring ice for their preservation, require ventilation, and for such commodities ventilator cars are provided. These are so constructed that fresh cool air may flow through the lading. Fruits, melons and vegetables are frequently shipped in ventilator cars.

52a. Weighing. The Interstate Commerce Commission has recently given much consideration to the question of the correct weighing of shipments. It was found that a majority of the scales used by carriers are not standard and that erroneous weights were the practice rather than the exception. The shipper has a right, under the law, to

have the correct weight of his shipment ascertained so that the charge computed may be correct.

At all points where the L. C. L. freight is accepted for shipment carriers maintain scales. These scales should be standard tested, and it is the duty of the carrier to obtain the correct weight of shipments. Track scales are maintained for the weighing of carload traffic and should be subjected to the same tests for accuracy as the carrier's house scales.

The shipper, or his representative, should acquaint himself with the proper methods of using both track and house scales, and see to it that correct weights of his shipments are obtained.

The action of the Commission has caused the carriers to set about the correction and standardization of their scales, and scale-testing cars are now employed by the carriers in regular inspection of scales.

53a. Wharfage. Wharfage is a charge made by the water carriers for handling freight at the wharves.

54a. Yardage. Shipments of live stock consigned to stock yards located in various sections of the country, when unloaded and confined in yards, are subject to a yardage charge. For example: Union Stock Yards and Transit Company, Chicago, Ill., make the following charges:

On	Horses	$0.25 per head
	Colts	.15 per head
	Cattle	.25 per head
	Calves	.15 per head
	Hogs	.08 per head
	Sheep	.05 per head

These charges are in addition to the transportation and other charges.

CHAPTER II.

JURISDICTION OF INTERSTATE COMMERCE COMMISSION OVER TRANSPORTATION SERVICE.

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CHAPTER II.

JURISDICTION OF INTERSTATE COMMERCE COMMISSION OVER TRANSPORTATION SERVICE.

The jurisdiction of the Interstate Commerce Commission over interstate transportation service is stated in Section 1 of the Act to Regulate Commerce as follows:

"That the provisions of this act shall apply to . . . any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment), from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this act shall

not apply to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid.

"The term 'common carrier' as used in this act shall include express companies and sleeping car companies. The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.

"And it is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates or tariffs, the issuance, form and substance of tickets, receipts and bills of lading, the manner

and method of presenting, making, packing and delivering property for transportation, the facilities for transportation, the carrying of personal, sample and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing and delivery of property subject to the provisions of this act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property subject to the provisions of this act, upon just and reasonable terms, and every such unjust and unreasonable classification, regulation and practice with reference to commerce between the states and with foreign countries is prohibited and declared to be unlawful."

Numerous reviews by the Supreme Court of the United States of attack upon the constitutionality of the Commission's powers over interstate transportation and its agencies have uniformly resulted in holding that the Commission's jurisdiction is complete and inclusive of any rule, regulation or practice of transportation that is obligatory upon the shipper.

§ 1. Duty of Carriers to Furnish Service.

The provisions of the Act to Regulate Commerce require the carriers to furnish transportation service upon reasonable and just terms, equally and impartially to all shippers entitled thereto. The term transportation shall include cars and other vehicles and all instrumentalities and facilties of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all service in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish

such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes and providing for reasonable compensation to those entitled thereto.

Act to Reg. Com. (Amd. 1910), Sect. 1.

By Section 3 of the act the carriers subject thereto are required to "afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith."

Act to Reg. Com. (Amd. 1910), Sect. 3, Par. 2.

The Commission and the courts have dealt with this requirement in the furnishing of transportation service from a public welfare standpoint, conserving both the interest of the railroad investor and the public recipient of its service. The attitude of the Commission has at all times been that of an administrative agency charged with the execution of the Act to Regulate Commerce in pursuance of public policy.

In the recent Five Per Cent Case (31 I. C. C. Rep. 351 and 32 I. C. C. Rep. 325) the Commission clearly stated its attitude toward the development of, and necessities for, adequate transportation service, in the following language: "The means of transportation are fundamental and indispensable agencies in our industrial life and for the common weal should be kept abreast of public requirements," for "the public interest demands not only the

adequate maintenance of existing railroads, but a constant increase of our transportation facilities to keep pace with the growth and requirements of our commerce." The carriers owe and must furnish, if they are to fulfill the functional purpose of the act, an efficient transportation service at reasonable rates, and this fundamental doctrine has been recognized by the Commission in the performance of its duties.

§ 2. Equality in the Granting of Privileges and Rendering of Accessorial Service to Shippers.

While it is legally optional with the carrier whether it allow a transit privilege or service, in connection with its transportation service, it may not grant, allow or render such privilege or service to one shipper and deny it to another similarly situated. The prohibition of a discrimination of this nature is found in the third section of the act, making it unlawful for any carrier subject to the provisions of the act to "make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or to any particular description of traffic in any respect whatsoever."

Act to Reg. Com. (Amd. 1910), Sect. 3, Par. 1.

(1) Discriminations in Transit Privileges and Services Prohibited When Unjust. A distinction may be drawn between a transit privilege and a transit service when a question of discrimination arises. It is a privilege to permit the shipper to clean, sort, grade and mill his grain in transit, even though it involve a service on the part of the carrier, but it is, strictly speaking, a service to ice shipments which the carrier undertakes to transport in refrigerator cars, and the law places upon the carrier the duty to afford such care in transit as the perishable or

other nature of the traffic requires, when the carrier undertakes the transportation thereof. The legality of transit privileges was early questioned by the Commission and its first expression of its authority was to the effect that the Act to Regulate Commerce did not sanction such privileges.

Crews vs. R. & D. R. Co., 1, I. C. C. R. 401, 1 I. C. R. 703.

It was found by the Commission, however, that these practices entered to such a considerable extent into the industrial and commercial transactions of the country that "to abrogate these privileges would be to confiscate thousands and probably millions of dollars in value, by rendering worthless industrial plants, which have been constructed upon the faith of their continuation. Nor is it a forced construction of the statute to hold that when the product finally goes forward to the point of consumption it but completes the journey upon which it entered when the raw material was taken up. There can be no doubt that the application of this principle has cheapened the cost of transportation and probably of manufacture."

Cent. Yellow Pine Assn. vs. V. S. & P. R. Co. et al., 10 I. C. C. R. 193.
See also Re Alleged Unlawful Rates in Transportation of Cotton, etc., 8 I. C. C. R. 121.
Re Rates and Practices of M. & O. R. Co., 9 I. C. C. R. 373.

Transit arrangements, in their most common form at least, are susceptible to defense only upon the theory that the inbound and outbound movements are in fact parts of a single continuous transaction. While the freight is delayed at the transit point the shipment is merely suspended temporarily. the present intention of the shipper being to forward the goods to their ultimate destination. Once let it be conceded that the inbound and outbound

movements are separate and distinct, and the impropriety of applying any rates other than the regularly established locals would be self-evident.

Re Reduced Rates on Returned Shipments, 19 I. C. C. R. 409.

Carriers may not discriminate unjustly in the granting transit privileges as between individuals, descriptions of traffic or localities.

Shiel & Co. vs. I. C. R. Co. et al., 12 I. C. C. R. 210.
St. Louis Hay & Grain Co. vs. M. & O. R. Co., 11 I. C. C. R. 90.

The granting of transit privileges is always fraught with the danger of irregular and discriminatory practices. Thus, it is "clearly discriminatory to single out one or more of several milled products of grain and withhold from it or them transit privilege which is granted at that or some other competitive point to other milled products of grain substantially similar in character, value and packing, and which are transported under substantially the same conditions, attended by substantially equal risk, where there is competition between the millers of the grain either in marketing their product or in securing their material for milling."

Douglas & Co. vs. C. R. I. & P. R. Co. et al., 16 I. C. C. R. 232, 244.

There can, however, be no question as to the right and power of the Commission to order the removal of an unjust discrimination and to prescribe such reasonable rates and regulations as will effect such removal.

Douglas & Co. vs. C. R. I. & P. R. Co. et al., 16 I. C. C. R. 232.

The granting of transit privileges in connection with a certain commodity at one point on the carrier's line and

denying it to another point on the same line, under substantially similar conditions, is unjustly discriminatory.

City, etc., vs. M. P. R. Co. et al., 12 I. C. C. R. 111.
See also same case in 12 I. C. C. R. 254.

Allowance by a carrier to shippers in one territory of the privilege of milling in transit must be without prejudice to the rights of shippers in another territory served by the same line.

Act to Reg. Com. (Amd. 1910), Sect. 1, Par. 7.

The history of transit regulation by the Interstate Commerce Commission has been replete with unsatisfactory situations both to the carrier and to the shipper. As a subject of regulation "transit privileges" constitute a menace to the strict principles of the act.

After making numerous rules to govern transit privileges the Commission, in 1913, withdrew its specific rules and left to the carriers the establishment of proper regulations governing the extension of transit privileges, but charging such carriers for the future with a strict adherence to the requirements of the regulating laws and holding that transit is a practice or regulation included within Section 15 of the act giving the Commission full jurisdiction thereof.

The Commission still adheres to its attitude regarding transit as a menace to established rates and holds that its fundamental basis and chief justification is the equalization of rates and the prevention of discriminations. The Commission does not look with favor upon an extension of the transit privilege to include additional processes, unless it is clearly shown to be necessary in order to avoid discrimination, promote commerce and effect other proper and lawful results.

Certain basic principles underly the transit privilege, when accorded the shipper in a lawful manner, which are worthy of note at this time. The rate, the transit service and the regulations governing the service, taken collectively, are a unit, and ordinarily should only be afforded products which move at the same or very nearly the same rates as the material from which they are made. The controlling principle adhered to by the Commission is that the transit rules should be uniform, and that their purpose is the prevention of discriminations. In furtherance of this principle the Commission has in no case declined to establish a transit arrangement where facts showed its establishment was required.

(2) Attitude of Interstate Commerce Commission Toward Transit Rules and Regulations. The present attitude of the Commission towards transit rules and regulations is best expressed in the case of National Casket Co., et al., v. Southern Railway Company, 31 I. C. C. Rep. 678, 686, where the Commission said:

"As the result of disclosures of extensive unlawful practices revealed by the general transit investigation we endeavored to aid both carriers and shippers by outlining with some degree of particularity rules and regulations designed to minimize or eliminate such practices. Those unlawful practices were due in part to loosely drawn rules, but in the main were due to devices resorted to by shippers to secure advantages in rates, which devices were generally known to and winked at by the carriers. Those rules and regulations were either suggested in the several reports in the transit case or were embodied in Rule 76 of the Commission's tariff circular. When, later, the impracticability of having uniform rules applicable to the varied and varying conditions in different parts of the country became evident, and for other reasons recited in our last

report in the Transit case, we rescinded those rules and withdrew our suggestions, insisting, however, that the carriers must show clearly in their tariffs what they would provide and what the shipper might demand under their transit rules; that the rules be enforced alike as to all users thereof, and that the practices thereunder must be in accord with the plain intent thereof. 26 I. C. C. Rep. 204.

"Complainants seem to assume that by withdrawing these rules and suggestions we reversed the views which we had theretofore expressed regarding the impropriety and unlawfulness of many of the practices which had been under investigation. Upon brief, counsel for complainants contend in respect of defendant's action in reinstating and maintaining the mixing privilege, so called, allowed by Rule 13.

" 'Notwithstanding the fact that its transit rules are based upon the opinions mentioned, it has not seen fit to change its tariff to meet the views of the Commission as expressed in opinion No. 2188 (26 I. C. C. Rep. 204), which destroyed the effect of the opinions upon which its transit tariffs are based.'

"The brief fails to present a full statement of our views upon which complainants rely. After a resumé of the proceedings in the Transit case, including a statement of the suggestions coming from separate and independent conferences of both shippers and carriers and a recital of the fact that both urged revocation of Rule 76 and tendered a substitute therefor which we stated amounted to a request for the authorization of substitution, we said at page 209:

" 'We think that the time has come to take a stand upon this general subject whch may appear to be somewhat inconsistent with our attitude in the past. However that may be, we intend that the views which we now express

shall supersede all that has been promulgated heretofore on the subject of transit privileges and their regulation insofar as it may have constituted a rule of action.'

"And at page 210 we said:

" 'Upon careful consideration of the whole matter it is our conclusion that we should accede to request that Rule 76 be cancelled, but, on the whole, we do not think that it would be wise, even if within our province to publish as a ruling of the Commission such a requirement as has been proposed. It is our best judgment that the policy of making orders, drawing rules or expressing views as to what would or would not, under certain conditions, be considered as a violation of law as to transit privileges, be now departed from by us, as the carriers are charged with the duty of initiating their rates, regulations and practices under their own responsibilities and liabilities imposed upon them by the act subject to appropriate action on the part of the Commission or the court in the event that the rates, regulations or practices are found to be in violation of law.'

"There is no warrant for assuming that we acceded to the suggestion that the substitution of one kind of lumber for another may lawfully be made unless it is authorized by the tariff or that we have receded in any degree from the opinions hitherto expressed touching upon the unlawfulness of any practice or device not authorized by the tariff by which the integrity of a through rate is impaired; unjust discrimination or undue preference is given or secured; or the requirements of the law or the tariff are in anywise evaded.

"The law is as binding upon the shipper and the carriers as it was before we rescinded Rule 76 and withdrew our suggestions. The obligation to observe its letter and spirit rests no less lightly upon all parties subject to its

provision. The penalties for its violation are unchanged. It is now, as it was then, the duty of the carriers to initiate and properly police their transit arrangement. It is now, as it was then, the duty of the shipper to conform his operations to the requirement of the law and of all reasonable rules and regulations of the carrier designed to insure the observance of the law. Property treated or stored in transit necessarily passes temporarily out of the possession of the carrier and into the custody of the shipper.

"That there may be no excuse for misinterpretation of the Commission's attitude upon this subject, and for that reason solely, we direct attention to the fact that there are now pending in the Federal Court several criminal prosecutions approved by this Commission against shippers charging them with unlawful substitution of lumber or grain in transit."

§ 3. Unjust Discriminations in Privileges and Services Prohibited by Law.

Several of the laws constituting the interstate regulating system contain prohibitions of different forms of unjust discriminations. The Act to Regulate Commerce forbids unjust discriminations of different natures. Section 1 of the act prohibits unjust discriminations in the furnishing of the transportation service and in the charges therefor. The prohibition in this section is sufficiently general to include discriminations of any nature connected with regulated transportation, when that term is considered inclusive of the service, facilities and compensation therefor. It is the expression of the underlying principle of the act—the elimination of unjust discrimination and extortion.

Discrimination, however, is ever so much a question of fact, that the Act to Regulate Commerce cannot be said

to do more than the common law does to define what particular acts shall constitute unlawful discriminations. It commits to the Commission the determination of fact, the wrong of the carrier and that the wrong operated to the injury of the shipper. In other words, within the province of the Commission rests the ultimate use of the common law principle, to the end that the discrimination practiced shall not exceed that which is warranted by differences in circumstances and conditions.

By reading the second, third and fourth sections of the act in conjunction with the first section, the purpose of Congress becomes broadened out in the expression of a concrete rule, and that is, that every reasonable and proper facility shall be extended by a carrier, without favor or prejudice, to all equally entitled thereto. The plain purport of the first four sections of the act is that it is the carrier's duty to serve the public without discrimination and at reasonable rates.

The prohibition of the Act to Regulate Commerce against unjust discrimination is sufficiently broad to include discriminations in the furnishing of the transportation service, the affording of privileges to shippers or carriers, and in the rates and charges. Section 2, while it directly prohibits unjust discrimination between persons, predicates the prohibition upon the service described as "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." The construction of the courts has been that the words "substantially similar circumstances and conditions" have reference only to questions of transportation or haulage.

Unjust discriminations in like kinds of traffic, between persons similarly situated, and between localities, are declared by the act to be unlawful. The prohibitions of the

other interstate acts do not operate to broaden the prohibitions of the Act to Regulate Commerce, but rather give concrete status to certain kinds of discriminations. Thus, Section 15 of the act defines a specific act of unjust discrimination when any regulation or practice is unwarrantedly withdrawn from a shipper which represents an equal opportunity of using and taking advantage of the rates offered by a carrier to the public.

Unjust discriminations in privileges and services offered by carriers to the shipping public are prohibited by the law, the doctrine of the regulation being that it is the duty of the carrier to furnish its service and provide facilities to all who apply at reasonable rates and without discrimination.

See "The Interstate Commerce Law," "Nature of Discrimination," Chapter XXIII.

§ 4. Duty of Carriers to Establish and Operate Through Routes.

In Section 1 of the Act to Regulate Commerce it is made the duty of carriers subject thereto to "establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto."

Act to Reg. Com. (Amd. 1910), Sect. 1, Par. 2.

The precise meaning of the phrase "through routes" is a "route" established as a unit by agreement, either voluntary or under the requirement of the Commission, by two or more carriers, to provide a line of transportation made up of all or parts of their lines between certain points.

This provision of the law, from its inception, was designed to remedy one of the most vicious evils in our earlier transportation system, the lack of rates, facilities and method for handling shipments through to destination, when their movement involved two or more lines of railway. It was the beginning of a standardization of service as well as of tracks and vehicles and establishing a concert of action in the successive receipt and movement of shipments by connecting carriers under through bills of lading for continuous carriage.

The act contemplates a "common arrangement" between carriers whereunder just and reasonable rates are applicable and reasonable facilities are provided for the operation of such through routes, with reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes.

It must not be understood that this requirement of the law for the establishment of through routes necessarily includes the establishment of "joint through rates"; the mandate of the statute contemplating simply the arrangement for the through service of transportation. The test of a "through route," in the language of the Commission, is a shipment sent through to destination without the intervention of the shipper at junction.

Baer Bros. Merc. Co. vs. M. P. Ry. Co., 17 I. C. C. Rep. 225, 226.

Carriers engaged in a through route, in law, constitute a single line of transportation.

§ 5. Power and Authority of Interstate Commerce Commission to Establish and Require the Operation of Through Routes.

As noted in the preceding section, Section 1 of the act required the carriers to establish and operate through

routes. In 1906 the act was amended so as to give the Commission authority to establish a through route between points where no satisfactory route existed. This amendment provides that the Commission "may . . . establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line." This authority, however, is subject to limitation.

"The Commission shall not, however, establish any through route, classification or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare or charge when the transportation is wholly by water, and any transportation by water affected by this act shall be subject to the laws and regulations applicable to transportation by water."

And the further restriction upon its power:

"And in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common arrangement or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with

another practicable through route which could otherwise be established."

These several provisions of Sections 1 and 15 must be construed, however, in conjunction with the following requirement of Section 3 of the act:

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between the respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Act to Reg. Com. (as amended), Sects. 1, 3, and 15.

The amendment of 1910 further amplified the previous empowerments of the act with respect to the establishment of through routes by the Commission. Prior to 1910 the Commission's power was limited to instances in which no satisfactory through route was in effect. At the present time a much broader scope is given to the Commission's power to establish through routes, and the fact that there exist through routes capable of adequately and expeditiously handling all traffic is not a bar to the establishment by the Commission of another route. It amounts to a discretionary power with the Commission to determine the necessity for the establishment and operation of a through route from a standpoint of public interest.

The controlling case on the Commission's power to establish through routes is Flour City S. S. Co. vs. L. V. R. R. Co., 24 I. C. C. Rep. 179, 184.

Congress has, as will be seen from the above quotations of the law, expressly placed upon the Commission the prohibition against forming a through route which gives to the originating carrier less than the full length of its line haul, "unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established." This discretionary power, which is the only interpretation to be given to the Act of Congress, authorizes the Commission to act in the public interest, thereby giving to this feature of the regulation the broader scope of the entire Act, that every reasonable and proper facility shall be extended by the carrier upon equal terms to all entitled thereto and a practical facility given to the interchange of traffic between connecting lines.

Concentration of Cotton at Points in Arkansas, 29 I. C. C. Rep. 106, 108.

Wichita Board of Trade vs. A. & S. Ry., 29 I. C. C. Rep. 376, 379.

Paducah Bd. of Trade vs. I. C. R. R. Co., 29 I. C. C. Rep. 583, 591.

Lumber Rates from Oregon & Washington, 29 I. C. C. Rep. 609, 618.

Cement Rates from Mason City, 30 I. C. C. Rep. 426, 430.

Eastern Shore Development Co. vs. B. & O. R. R. Co., 32 I. C. C. Rep. 238, 243.

Flour City S. S. Co. vs. L. V. R. R. Co., 24 I. C. C. Rep. 179, 184.

Haverhill Box Board Co. vs. B. & A. R. R. Co., 28 I. C. C. Rep. 336, 338.

Trucker's Transfer Co. vs. C. & W. C. Ry. Co., 27 I. C. C. Rep. 275.

Coal Rates on the Stony Fork Branch, 26 I. C. C. Rep. 168, 173.

Wichita Falls System Joint Coal Rate Cases, 26 I. C. C. Rep. 215, 223.

St. L., S. & Peoria R. R. vs. P. & P. U. Ry. Co., 26 I. C. C. Rep. 226, 234.

Blakely So. R. R. Co. vs. A. C. L. R. R. Co., 26 I. C. C. Rep. 344, 350.
Joint Rates on Grain via Minnesota Transfer, 26 I. C. C. Rep. 595, 597.
S. W. Missouri Millers' Club vs. S. L. & S. F. R. R. Co., 26 I. C. C. Rep. 630, 634.
Chamber of Com., etc., vs. N. Y. C. & H. R. R. R. Co., 24 I. C. C. Rep. 55, 76.
Coml. Club of Superior, Wis., vs. G. N. Ry. Co., 24 I. C. C. Rep. 96, 112.

§ 6. Interference with Continuous Shipment Prohibited by Law.

The Act to Regulate Commerce declares it shall be unlawful for any common carrier subject to its provisions "to enter into any combination, contract, or agreement, express or implied, to prevent, by change of time schedules, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination."

Act to Reg. Com. (Amd. 1910), Sect. 7.

(1) Duty of Carriers to Furnish Facilities for Interchange of Traffic. The Act imposed upon all common carriers subject to its provisions the duty of affording, according to their respective powers, "all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Act to Reg. Com. (Amd. 1910), Sect. 3, Par. 2.

§ 7. Duty of Carriers to Furnish Equipment.

Prior to the 1910 amendment of Section 1 of the Act to Regulate Commerce, the Commission had held it the duty of a carrier to furnish an adequate and suitable car equipment for all the business which it undertakes, and also whatever is essential to the safety and preservation of the traffic in transit.

> Truck Farmers Assn., etc., vs. N. E. R. Co., etc., et al., 6 I. C. C. R. 295.

The Commission had also declared it the common law and charter duty of every railway company subject to the Act to Regulate Commerce, to furnish a proper and adequate car equipment for all the reasonable needs of the business which it advertises and undertakes to do, and if the carrier fails to do this, to the wrongful injury of the shipper, it is liable in damages therefor.

> Scofield vs. L. S. & M. S. R. Co., 2 I. C. C. R. 90, 2 I. C. C. R. 67.
>
> See also Re Charges for Transportation and Refrigeration of Fruit, 11 I. C. C. R. 129; same matter in 10 I. C. C. R. 360.

By the definition of the term "transportation" to include cars and other vehicles and all instrumentalities or facilities of shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof, and the requirement that every common carrier subject to the Act shall provide and furnish such transportation (including cars and other vehicles) upon reasonable request therefor, and make reasonable rules and regulations for the exchange, interchange, and return of cars, absolute power is conferred upon the Commission to require the carrier to provide and furnish the proper car equipment necessary for the business it undertakes and essential to the preservation of the traffic transported. This

means not only must the carrier furnish cars for transportation purposes, but such cars must be in suitable condition for use.

Act to Reg. Com. (Amd. 1910), Sect. 1, Par. 2.
See also Indpt. Refrs. Assn. vs. W. N. Y. & P. R. Co., 4 I. C. C. R. 162.
Truck Farmers Assn., etc., vs. N. E. R. Co. et al., 6 I. C. C. R. 295.

In the Paraffine Works case, decided May 11, 1915, the Commission gave full expression to its views of the legal requirements placed upon the carriers to furnish all necessary equipment. It held itself to have the power to require of the carriers all necessary equipment both ordinary and special, including oil tank cars.

An adequate car supply is an administrative question, ruled the Commission, of which it alone can take original jurisdiction, and cars, without regard to ownership, must be distributed without discrimination.

Paraffine Works vs. P. R. R. Co., 34 I. C. C. Rep. 179.
Crew-Levick Co. vs. P. R. R. Co., 34 I. C. C. Rep. 179; etc.
Vulcan Coal & Mining Co. vs. I. C. R. R. Co., 33 I. C. C. Rep. 52.
A. T. & S. F. Ry. Co. vs. U. S., 232 U. S. 199.
Arlington Heights Fruit Exchange vs. S. P. Co., 20 I. C. C. Rep. 106.

The carriers have sought an injunction against the carrying into effect of the Commission order which is now pending in the courts.

The report of the Commission is that all cars used by carriers, whether they be owned by the carriers themselves or leased from private car lines or from shippers, must be distributed without discrimination, although the order itself merely reads that the carrier shall "provide" the tank cars necessary to enable it to carry out the terms of its tariffs. It is the present contention of counsel for

the Commission that the phrase in its report that the privately owned cars "are available" means "with the consent of the owners." These contentions, however, do not in any wise detract from the acknowledged power of the Commission, under the amended Act, to require the carriers to provide cars upon reasonable request.

See "Car Equipment and Supply," Chapter IV, *et seq.*

§ 8. Summary of Commission's Jurisdiction, Inclusive of Secondary, Incidental, or Accessorial Services, and Transit or Other Privileges.

In describing the scope of the Commission's jurisdiction over transportation service, and services connected with transportation, it is properly said that its authority is both original and complete as to interstate traffic. No single section of the Act to Regulate Commerce, or of the supplementary laws, determines the extent of this authority. The full scope of the Commission's powers of regulation is found in a composite analysis of the entire parent Act, the amendatory statutes, and the interpretative decisions of the courts. Such an analysis develops the fact that it was and is the intention of Congress to endow the Commission with the power of impartially regulating a very practical public service and to make rules for its regulation which are intended to deal with actual rather than with constructive or imaginary things.

To describe the jurisdiction of the Commission as complete over interstate transportation does not mean the Commission may control the physical operation of the railroad nor its physical maintenance. Neither may the Commission in a matter of business policy substitute its judgment for that of the carrier. But it does possess a complete authority over the acts of the carriers and their

relations with the users of their service in all matters connected with the performance of interstate transportation service.

It is clearly the intent of Section 1 of the Act that Congress compels the carrier to perform, to the full, its transportation service in all its essentials and to put that entire service within the jurisdiction of the Commission, to the end that unreasonable and discriminating charges and practices might be prohibited. Thus, for instance, the meaning of the first section of the Act is clearly to impose upon the carrier the duty not only to maintain and furnish transportation service, upon reasonable and non-discriminatory terms and conditions, but also to assume the duty of refrigerating, storing, elevating, transferring, icing, handling, receiving, and delivering, in so far as those matters are properly incidental to the transportation service.

To define "service" within the jurisdictional confines of the regulating system means to distinguish it from "operation" and "maintenance" in any well-organized system of railroad transportation. "Service of transportation," as used in the Act, is clearly a relationship existing between the carrier and the owner of the goods transported, which consummates the desires of the owner of property to cause its movement in the course of commercial or private intercourse. That this relationship between the parties shall be a just, reasonable and non-discriminating means of service is the supreme mandate of the regulating laws.

The scope given to the term "transportation" in the first section of the Act, to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit,

ventilation, refrigeration or icing, storage, and handling of property transported," fixes with certainty the physical extent of service to be comprehensive of all matters properly affecting the public in its shipping transactions.

This definition of the "service" is preceded in the Act by a statutory definition of the "common carrier" as inclusive of railroads, express companies and sleeping car companies, together with a definition of the term "railroad" to "include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease," and "also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of said property," and is followed by the following requirement:

"It shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto."

In Section 12 of the Act the Commission is charged with the duty and "authorized and required to execute and enforce the provisions of this Act."

Section 15, as amended in 1910, following a previous amendment in 1906, removes all doubt of the fullness of the Commission's jurisdiction to control effectively the

service of interstate transportation, the cost thereof, and all rules, regulations and practices connected therewith, on its own initiative and without formal complaint. Under this section of the Act the Commission is empowered to determine and prescribe what will be the just, fair, and reasonable regulation or practice affecting the transportation service which shall thereafter be followed by the carrier as to all service which the carrier is required to furnish under Section 1.

In summary, while the Act does not specify that the Commission shall regulate every detail of railroad operation, it requires it to determine whether any rate or any regulation or practice affecting transportation is just, reasonable and non-discriminatory, and whether or not the carriers comply with the requirements of the Act to furnish adequate facilities upon reasonable request. If any stringent interpretation were placed upon the terms of the Act—"any regulations or practices whatsoever"—as they are used in a qualifying sense with the Congressional investment of powers of regulation in the Commission, such construction could not be less in effect than that this jurisdictional phrase must be used synonymously with the words, "regulation or practice in respect to such transportation," and both clauses must be read in the widest possible sense and embrace all regulations and practices of carriers under which they offer their services to the shipping public and conduct their transportation.

While it is true, of necessity, there are many means and methods of conveyance and acts incident thereto which are not such transportation as is subject to the Act, there is no room for misunderstanding of the intent of Congress in conferring jurisdictional power upon the Commission sufficient in extent and scope to bring within the regulating authority the act of transportation, its instru-

mentalities, agencies, facilities, and means, the service of transportation in the sense of the orderly relation between carrier and shipper, the compensation for the service, and every rule, regulation, or practice in any wise affecting or connected with such service of transportation, inclusive of all services, ordinary or special, privileges, allowances, etc., properly incidental to and a part of the transportation required by the Act to Regulate Commerce.

There are many decisions among the reports of the Commission involving this jurisdictional question, but the cases cited below are of more recent date and in their holdings entirely comprehensive of the scope of the Commission's authority over transportation service:

Act to Reg. Com. (as amended), Sects. 1, 2, 3, 12, 13, and 15.

Vulcan Coal & Mining Co. vs. I. C. R. R. Co., 33 I. C. C. Rep. 52.

Penna. Paraffine Works vs. P. R. R. Co., 34 I. C. C. Rep. 179.

NOTE:—Particular attention is directed to the citations of decisions of the Commission, the Commerce Court, and the Supreme Court of the United States, holding that the Commission, and not the courts, is invested with authority to pass upon administrative questions, appearing in the Paraffine Works decision.

CHAPTER III.

KINDS OF FREIGHT TRANSPORTATION SERVICES REQUIRED.

§ 1. Local Freight Service.
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CHAPTER III.

KINDS OF FREIGHT TRANSPORTATION SERVICES REQUIRED.

In the introductory portion of this volume brief descriptions of the nature of freight services were included for descriptive purposes. In dealing with the kinds of freight transportation services required, the subsequent sections will be devoted to an analysis of transportation services and the development of the factors of regulation through which the regulating system is administratively applied.

§ 1. Local Freight Service.

While it is true that the term "local" as descriptive of transportation service must in its full sense include all service of a railroad which is rendered in connection with the transportation of traffic that originates and ends on that particular line, it is susceptible to two distinctions—i. e., inter-station service, exclusive of through terminal-to-terminal service, and through terminal-to-terminal service. The significance of these divisions of the service is as to cost of service rather than character of service. Indeed, our interest in the distinction of local service from any other kind of service is as to its bearing upon the reasonableness of rates. The regulating laws predicate their principles upon service. The more important principles of regulation requiring reasonableness of rates and forbidding unjust discriminations, can not operate fairly except as they properly differentiate in the character of

services of the carrier. The relative proportions and the distribution of local and through traffic upon two lines of railway of differing length under competitive stress with one another are primary factors in determining the ability of either to make a reasonable rate. This condition is the more emphatically prominent in any regulating system such as that now in vogue in the United States which embraces an effective long-and-short-haul law, where any reduction of the competitive rates necessitates a lowering of the rates at intermediate points. It would be foreign to any competent business policy of railroading for a road to give up lucrative rates upon a large volume of local traffic, unless it could gain either a large tonnage or a very long haul from a competitive point.

In many proceedings before the Interstate Commerce Commission the local rate has been used as a test of the reasonableness of the through rate, but in each such case the characteristics of the local service alone made comparison possible. At no time, however, has the Commission established a status for local service, in a sense of the control of through rates. The differences and exigencies of railroad operation in the United States disparage any standards of significance which might otherwise attach to the local service as a basis of control of rates. The various factors affecting rates, and in other ways reacting upon the practices of transportation agencies, have developed certain incidental and important relations to which consideration must be given, and the distinctions in local service above mentioned are essential in the proper segregation of service costs determining the propriety of the rate.

The primary business of every railroad is its local traffic, and, therefore, its primary service is its local service. This service establishes the railroad plant as an operating

agency of transportation, and certain relative laws of cost distribution pertain until congestion seizes upon the road and a new ratio of costs appears.

Local freight consists largely of package freight, i. e., less-than-carload shipments, although there are roads, of course, where the local traffic includes a substantial quantity of carload tonnage. The handling of shipments in local freight service necessarily entails greater expense upon the carrier than the handling of a like amount of the same freights in its through service. The equipment and motive power employed in performing the local service can not be used, on the average, to anything like maximum capacity. The wear and tear upon both equipment and locomotives are relatively greater in local service.

In the loading of local shipments into the cars, freight must be loaded in destination or station order, in the direction in which the train is proceeding. Because of the frequent handling and working of the load in a local car, even if the volume of traffic will permit, it is impracticable to load to the full capacity of the car. Room must be left in each car for the freight handlers to load and unload shipments at successive stations, unless an entire carload is destined to one point. This condition of service renders it impossible to avoid revenue deficiencies in local cars.

It is obvious that a local freight train, leaving a terminal or junction point for distribution of local shipments, will diminish its load station by station, and will, in turn, pick up at the local points much less freight, in the aggregate, than it discharges. This is a statistical truth in local freight service, at average stations. So, in the case of the local train returning to a terminal or junction point, or, in other words, working the opposite station order, providing it does make-up at some important distributing point, it will load at the successive stations a greater

amount of traffic than it discharges, since it is operating against the established traffic flow. It is also statistically known that local inter-station business, when segregated from through or terminal-to-terminal traffic, averages from five to ten per cent. of the railroad's entire volume of business. Thus, much empty equipment is hauled over the road in the local service, which produces, for part of the haul, at least, no revenue, but adds its portion to the expense of operating the service.

The cost of the local freight train service is vastly in excess, relatively, of the expense of the through service, aside from the added cost of performing the necessary local switching movements which must be made at local points.

But the local service may not be curtailed beyond the point where an adequate daily service is afforded the local points. It is part of that transportation service which the laws require must be rendered by the carriers upon reasonable demand therefor. Nor, in the construction and interpretation of the laws by the regulating authorities, may the carriers cause the local service to bear an unjust burden of the general expenses of the railroad, reflected in higher local charges, any more than they are permitted to cast upon the through service a higher cost, because of unprofitable local rates.

The expense of the local terminal-to-terminal service, because of the lesser incidental costs of handling, time consumed in service, motive power operation, wear and tear upon equipment, etc., is proportionately lower than the local station-to-station service.

§ 2. Through Freight Service.

One of the earlier evils of transportation in this country was the lack of facilities for the through carriage of ship-

ments of freight involving hauls over two or more lines of railway. In the past twenty years tremendous improvements have taken place in the handling and movement of through traffic. It has been altogether an operating problem, as the rapid commercial development of the country has furnished, unsolicited, the greatest tonnage known in the commercial history of the world. Today the through service has been developed to the extent that it may be classified into "through merchandise," receiving the most expedited service within the power of the carriers, "the fast freight line service," which is but another name for the expedited merchandise service, the "preference freight" and the "slow freight" services. Some railroads make still another division of their traffic into simply "preference" and "slow" freight.

Time of movement and approximate certainty of arrival are dominant factors in the success of a fast merchandise service. Prior to 1895 freight service on American railroads was irregular and uncertain, even in the case of the high-class and perishable freights. It then took from five to six, and sometimes seven days, to make delivery of New York freight in Chicago or St. Louis. At present a 60-hour merchandise freight schedule is maintained between New York and these western points and their immediate territory.

As time went on and the service from the seaboard ports to the principal distributing centers in the West became regular and uniform, the receivers, who by reason of custom and trade conditions, bought their goods from manufacturing cities in eastern territory, f. o. b. New York, Boston, or Philadelphia, began to route their shipments direct from these manufacturing points to destinations. The local charges to New York, Boston, or Philadelphia were avoided, and gradually, by means of ferry or trap-

cars, the shipments were forwarded direct to concentrating points. The service has been perfected upon a similar basis from practically every producing point east of Buffalo and Pittsburgh. The service from the concentrating points is the same as from New York. The carriers forming the through routes have accomplished this only by great effort, close co-operation, and continuous study of the constantly changing conditions.

By establishing buying or resident agents in the eastern cities to consolidate a large portion of their express shipments into freight shipping units, thus enabling the merchants to use freight service instead of express on large shipments of rush seasonable goods, a great saving to the individual business interests has been accomplished. It has been a great factor in the tremendous development of the jobbing, retail, department and other stores throughout the Middle West, whose growth prior to the adoption of the through merchandise service was slow, because of the expense of carrying large stocks, and the necessity of the payment of higher express charges, on rush orders.

The quality of the transportation service which is now afforded by the carriers is best illustrated by the fact that it is not unusual for western merchants to advertise special sales in advance of the arrival of the goods. The benefits of this service were particularly demonstrated after the financial disturbance of 1907, when, by means of the fast through freight service, merchants were able to keep their stocks at a minimum and to effect large economies by a minimum outlay and consequent constant turning over of cash.

With the great expansion of commercial activities as compared with conditions of twenty years ago, the item of transportation cost to the shipper of less-than-carload mer-

chandise traffic (particularly first, second, and third class), as compared with other expenses created with modern methods of trade extension, such as immense stores, extensive and costly advertising, high-salaried buyers and salesmen, is relatively much smaller, especially so in that fast freight service now more competently serves the commercial needs. This through service brought an increased tonnage to the carriers, but, unfortunately, the increase in revenue to the carriers has not kept pace with the enlarged expenses, because of the limitations in tonnage per car and the costly extension of the service to ever-increasing territories.

In the last few years the shippers in all the important shipping centers in Official Classification territory, to meet the competition of other trade centers, and supplemented by the effect of railroad competition, have brought about a constantly increasing number of points to which such through service is required. To initiate such loading, these cars are often started with a minimum amount of tonnage, frequently requiring additional equipment, and consequently reducing the per-car-load of all equipment.

The merchandise or preference freight trains must be operated on fixed schedules, many times to the detriment of other service, with approximately fifty per cent. less tonnage per car than the ordinary train carrying "slow" freight.

This through service has required largely increased yards and terminals, with correspondingly greater number of employes, large freight locomotives of special designs, improved roadbeds, additional passing tracks, elimination of grade crossings, installation of automatic block signals, and modern equipment of increased size and strength. It also requires extensive terminal service and transfer facili-

ties, operated both day and night, in order to facilitate the handling of shipments.

Before the era of fast through freight service no road had more than one station from which it undertook to give through service. Today, for instance, in eastern territory, the shipper can deliver before 4:30 P. M. at nearly all regular freight stations, and his shipments are consolidated at some transfer station with other through freight, in time for forwarding in straight cars the same night to all the principal distributing points in the West, including the Pacific Coast. To accomplish this and meet the continuous demand for freight service, the carriers in the East perform the necessary additional handling and, when shipments reach destination, a similar degree of high-pressure service is maintained.

It is apparent from competent records, that even by consolidating at transfer stations, an average loading of only 10,000 pounds is obtainable for a through merchandise car, occupying but 16⅔ per cent. of its carrying capacity and utilizing less than 50 per cent. of car revenue producing space. As compared with the local carload traffic, the wheelage expense is thus correspondingly increased. As it is conservatively estimated that 2,000 cars of merchandise are forwarded from New York by all-rail lines every working-day in the week, it is apparent that to meet properly the commercial conditions the carriers are utilizing in this service about 1,000 cars per day, or about 100 per cent. more equipment than if the conditions permitted the holding of freight for maximum consolidation.

In a recent test (1910) it developed that for 3,357 loaded cars hauled in manifest or symbol trains, the tonnage—8,371,800 pounds—represented but 39.1 per cent. of the total carrying capacity, whereas during the same period

8,192 cars, in slow freight train service, were loaded to 81.3 per cent. of their carrying capacity.

Fifteen years ago practically every shipper or manufacturer delivered his less-than-carload shipments at the regular receiving stations of the railroads. Now, thousands of jobbers and merchants in Official Classification territory are loading at their plants what are known as ferry or trap cars, subject to a fixed minimum of 6,000 to 10,000 pounds, according to class, and which, in most cases, go direct to the transfer station of the carrier on whose line the shipper is located and there receive the benefit of immediate transfer to through merchandise cars to various destinations.

Speed and reliability in the transportation of high-class merchandise traffic, like that for first-class passenger traffic, has come with the present-day methods of transportation of freight. Fast freight service describes an actual achievement and is an evolution in the movement of merchandise freight by American railways from the days before interchange of equipment and through service were actualities.

(1) Through Service Now Required. Through service, in the sense of a physical line via which the service may be applied, is now required of the carriers under the regulating laws, but not in the sense of a government fixed time-schedule. "Through service" is the service of transportation via a through route consisting of a continuous line of railway formed by an agreement, express or implied, between connecting carriers. The existence of a through route—and, therefore, a through service—is established when two or more carriers, owning connecting lines of railroad, unite in the acceptance of a through bill of lading, or unite in a joint through tariff publishing rates for the through service.

Prior to the amending of the regulating laws, the carrier, under common law, was not required to carry beyond its own line, and in the absence of statutory regulation, it might choose any particular route for its traffic it might wish. It could cause the shipper to transfer his shipments between connections and deny him a freedom of intercourse required in ordinary commercial transactions.

While the more progressive railroad lines had established through billing and through service with their connections long before the statutory requirement became effective, many parts of the country were without adequate through service until 1906. It needs no citation of authorities to prove that, under common law, a carrier may confine its business entirely to its own line. In fact, the Supreme Court of the United States ruled, in the case of A., T. & S. F. Ry. Co. vs. D. & N. O. R. R., 110 U. S. 667, that a carrier might, if it so pleased, receive freight from other carriers at any junction point in precisely the same capacity that it would receive freight from a wholesale house or other shipper doing business at such junction point And such a situation would amount to a defeat of the basic requirement of the Act to Regulate Commerce, because, under the common law, its rates would apply as on the date of its billing, rather than upon the date of the billing by a connecting line.

In 1906 the requirement for "through routes" came into existence as an amendment to the Act to Regulate Commerce, but without the power in the Commission to establish a through route, if the carriers failed to establish a satisfactory one. In 1910 the Commission was invested with the further authority to compel or declare through routes and joint rates.

It cannot be said, however, that the through service of the carriers has reached its present development solely

because of the statutory enactment. To the credit of the carriers, it must be said, that they have met, in the broadest spirit, the purport of the regulating laws and extended through service to practically all important industrial and commercial centers and their consuming territories.

A through service by interstate carriers consisting of the receipt of interstate shipments, issuance of receipts therefor, indication on waybills of final destinations, and the transportation and delivery to connecting carriers, with the duty of connecting carriers to transport and deliver at destinations (each carrier charging for its service its legally published rate), is made mandatory by the Act to Regulate Commerce. The establishment of through routes, with necessary facilities for transportation, is required, and every carrier subject to the Act is compelled to furnish such transportation service upon reasonable request.

Act to Reg. Com. (as amended), Sects. 1, 3, 12, 13, and 15.

(2) **Through Package Car Service.** The term "through package car" has come to denote an intensified part of the business of transportation. Through package, or "merchandise cars," as they are sometimes called, are loaded with less than carload shipments for a single destination. Such cars may, however, include shipments consigned beyond the through-car destination or "breaking-bulk" point. Thus, a through package car will be loaded in New York for Chicago and include in its load consignments destined to local points beyond Chicago. The routes and destinations for through package car service are determined by an established and constant flow of traffic between certain points and result from the efforts of the carriers to concentrate package freight movement as much as possible, in order to afford to shippers the most expedited dispatch of high-class merchandise freight.

While the first important extension of through merchandise car or package car service began in the eastern territory and developed throughout Official Classification territory, at present it is a general part of the plan of transportation service of American railroads. Wherever a sufficient volume of package shipments moves in any general direction, the package car service is in effect. The full meaning of the modern package car service is that the "through package car" is the one car of the entire railroad system which can take a shipment from origin to destination in the quickest time and in the best condition. It also means a minimum of transfers, as every transfer is a factor in the time of arrival and the condition of goods at destination.

The package car represents a superlative factor of transportation service, and its scientific use can not be attained without the most intelligent co-operation on the part of the shipper. It is a part of the transportation service designed to assist the consignee in disposing of his goods, thus stimulating markets and increasing tonnage of the carriers.

A broad policy of business is involved in the use by the shipper of the package car service. Each railroad, in point of service, is at its best at some particular point. The best railway system may not have the best service to a given point. It is the duty and policy of every carrier to accept shipments when offered, whether such carrier may be in position to afford the best service to destination or not. It is, therefore, the duty and should be the policy of every shipper, from the standpoint of his own interests, to be in a position to know which of the carriers can give him the best service to his destination-point. His should be a study of service, with the same keen analysis with which he solves the economic problems of his business, to deter-

mine which line performs the most satisfactory service to the desired point. Each line is superior to all others to some points, and at the same time it may be the worst to other points. In a large business he will patronize all lines, but his patronage of each line should be in accord with the quality of its service to him. If shippers would forego their attempts to control routings according to their own ideas of transportation service and confine themselves to determining the proper line and channel for their shipments, leaving the rest to the carrier, the results would be surprisingly satisfactory, in most instances.

Mr. J. F. Morton, Assistant Traffic Director of the Chicago Association of Commerce, in his remarks before the Traffic Branch of the Cincinnati Chamber of Commerce, November 10, 1913, called attention to the necessity for co-operation of the shipper, the salesman, and the consignee, in the use of package car service. Some extracts are given herewith:

1a. "Duties of the Shipper. We are not speaking of the shipping clerk, or the man actually making the shipment. It is the man behind the business; the man that produces; the man responsible for the success of the business of which he is the head, or the man who is responsible to the owner of such a business. This man may be the most up-to-date man in your community, using all the latest systems of labor-saving and efficiency devices known to business men. His methods for producing may be a model of efficiency. His sales department can not be excelled, his credit department is without a flaw, and his collection department equally good. He will spend a mint of money in these departments. He is careful that no competitor can equal his display of styles and desirable goods. He will resort to all honorable methods to make sales. He will investigate to the limit his debtors. He

will strain every nerve to fill his orders promptly, which orders he finally lands in the shipping room. What next? He apparently loses all interest in the transaction. He appears perfectly content to leave the finishing touches to a party whose interest is to get the shipment off of his hands, many times regardless of the interest of his employer. Apparently a shipping receipt is all that is required, making himself content with the privilege of blessing out the carrier for failure to make satisfactory time to destination.

"I believe that there is just as much necessity for strict business principles to be exercised in the shipping room as there is in the bookkeeping department. There is as much necessity for the shipping clerk to be equipped with the facilities for making shipments correctly as is the bookkeeper with his entries. The shipping clerk should be provided with such information as will enable him to route his shipments via the most advantageous route. He should be instructed to follow this information or instructions with no more deviation than any other department would be permitted to deviate from the general rules. To permit a shipment to leave the room with the routing influenced by another motive than the welfare of the house should be considered bad business.

2a. "Duties of the Salesman. It was at one time, more so than now, the custom of the salesman to request the consignee to furnish the routing for the order taken. This was done to shift the blame for poor service from the shoulders of the shipper to those of the carrier and consignee. It is so easy to say, when complaints come in, that 'it was shipped according to instructions.' He overlooks the fact that, while he has shifted the responsibility of bad service from his shoulders to those of the consignee, the consignee may at the same time shift his purchases to

a more advantageous market. The salesman should keep as well informed of the time required to deliver the goods as he is in the quality of the goods which he is selling, and should discourage as much as possible the dictation of the consignee, especially when it is a question of service only. We are willing to concede the consignee the moral right to request certain delivery, but I doubt if he should go so far as to concede the right to name the initial or intermediate lines over which the shipment must move. The salesman should ascertain the policy of the house in regard to such matters and enter heartily into the spirit of co-operation. He should report to the organization any defects in the service which may occur, or be suggested to him, so that steps may be taken to have the obstacle removed or avoided.

3a. "**Duties of Consignee.** The consignee, located at the other end of the line, is not, and cannot be, as familiar with the conditions at the shipping end as the shipper is, or should be. He should, therefore, not undertake to meddle, unless he is thoroughly familiar with such conditions. I am now speaking of the average consignee. There are exceptions, as we all know. Through the salesman and personal letters, when necessary, the shipper can educate his patrons to believe that the house is in a position to know more about transportation than the consignee, and is anxious to see that nothing else than the best is satisfactory for its patrons, and that it can better serve them when the routing is not interfered with."

4a. **Through Service from Important Distributing Centers.** Package car schedules are in effect from the principal cities of the country to a radiating territory the extent of the service being conditioned largely upon volume of traffic, and a study of them will be both instructive and profitable to shippers located at these points and also

to shippers located at other points who are interested in the development and use of through package car service.

§ 3. Fast Freight Line Service.

The "Fast Freight Line" service originated in a system employed by freight forwarders following the congressional authorization of through routes in 1866. This authorization was not mandatory in its effect, but instead conciliatory of a practice first resorted to by transportation agencies to give greater continuity to the carriage of shipments over the lines of two or more railroads. The "fast freight line" was the forerunner of the real "through route," and came into existence because of the lack of arrangements for the interchange of equipment between carriers. The method of the fast freight line was to acquire large numbers of freight cars and make arrangements with certain railroads over whose lines it was desired to establish a "through service." Thus, cars in fast freight line service were put into operation on and over entire railway systems, such as the Vanderbilt and Pennsylvania lines. This "through line" of service was frequently established by using several different combinations of roads, thereby causing rivalry to grow up between the carriers to be members of the fast freight "line." These fast freight lines retain today practically none of their original nature, are without legal status as a transportation agency, and constitute little more than trade names for certain established through routes. Thus, the Merchants' Despatch is a through freight service operating over the lines of the New York Central System, the Star Union over the Pennsylvania Lines, the Lackawanna Line, the Kanawha Despatch, the Central States Despatch Line, the White Line—all representing today simply the trade name of a through freight service. The Blue Line, White Line and Red Line

(now practically out of existence), known in their day as the "Color lines," were mostly utilized as eastbound despatch lines for handling carload business—mostly grain and products, did very little westbound merchandise business; on the other hand, while the Merchants' Despatch and Star Union have always done a large eastbound carload business, they are now and were previously the large westbound merchandise or L. C. L. lines.

It was a practice in the organization of these fast through freight lines, for the several roads over which they operated, to be assigned a certain number of freight cars (and in the case of some of the stronger lines they assigned a part of their own equipment) to be used in fast freight line service, which cars were marked with some sort of symbol, such as a star, a colored cross, or sphere, for the purpose of properly identifying such equipment as belonging to the particular service. In the "color lines" particularly, and in some of the other lines, equipment was not owned or provided by the lines, but two or more roads forming a fast freight line would assign a certain number of its cars to that line and such cars would be lettered and numbered accordingly.

The roads fixed the rates and the Despatch line received about 20 per cent. of the gross rate out of which they maintained their soliciting forces; balance went as compensation to the railroad that operated the lines and maintained the equipment, the Despatch lines making only the first investment of acquiring the equipment. The other lines were merely devices to effect through line service.

Originally a number of these fast freight lines were separate corporations, whose stock was largely owned by railroad officials over whose lines the fast freight service operated. The custom of selecting a symbol or colored design for this fast freight line equipment is responsible

for the present-day expression of "symbol trains," meaning a train affording a specially expedited service.

(1) Fast Freight Lines Without Legal Status. Where the operation of a fast freight line is so conducted by the carriers making up the line as to constitute such line a common carrier entity, it is, like all other common carriers engaged in interstate transportation, subject to the provisions of the Act to Regulate Commerce. However, where the fast freight line is merely a name representative of an arrangement between connecting lines for a through service, it possesses no legal status. But in a case where a fast freight line operates over the route of several connecting carriers, and the earnings and expenses of the line are divided among the carriers in agreed proportions, the carriers themselves must see to it that its tariffs are filed with the Commission, and that its rates are made to conform to the law.

None of the present so-called "fast freight lines" are common carriers subject to the Act to Regulate Commerce, although tariffs may be filed by them, but where that occurs the filing officer is acting merely as the agent of the railroads forming the line, and the act of the fast freight line is the act of the railroad common carrier. A complaint before the Commission must be filed against the railroad and not against the fast freight line.

Vermont State Grange vs. B. & L. R. R. Co. et al., 1 I. C. C. Rep. 158, 1 I. C. R. 500.

§ 4. Preference Freight Service Methods.

While the practice has not become in any wise universal, some of the western lines have adopted a more or less elaborate scheme of classifying freight traffic for movement into expedite or preference freight, calling for the fastest through schedule compatible with safety and

operating conditions, such as high class and valuable merchandise, perishable freight, and emergency shipments; fast through freight, calling for a less expedited movement, but still in the nature of fast freight line service; general freight, permitting of moderate delays in movement for the purpose of transferring and concentrating the tonnage for economy in loading equipment to maximum capacity; and slow freight, comprising the "dead freight commodities" in carloads, such as sand, lime, cement, plaster, coal, stone, gravel, etc., which may, under ordinary conditions, be the least affected by slow movement or delays in transit. Among roads hauling large quantities of particular commodities, such as coal, stone, fruit, meats, machinery, etc., a further classification for the purpose of expedition is made into train-loads. Thus, we have the so-called "meat train," "coal train," "silk special," "milk train," and so on.

These classifications of freight traffic for purposes of fast through movement, the avoidance of delays and unnecessary transfers, have necessitated change in methods of handling through freight depots, checking billing, loading, classification in yards, make up of trains, and the employment of more expert and intelligent clerical and operating forces.

The perfection of through billing has been an important step in the movement of through expedite or preference freight. A system of symbolic billing has proven advantageous. For instance, all manifest, expedite or preference freight is billed on what is termed a "red-ball" waybill—a red ball symbol appearing on all bills covering expedite freight. Fast through freight is billed, under this system, on "green-ball" waybills, or "red-ball" bills, general freight on "white-ball" bills, and slow freight on plain or unsymbolized bills. This method of billing is consid-

ered an aid in the rapid classification and movement of freight.

Extensive classification yards have been constructed by the carriers in which the loaded cars are classified according to the despatch and schedule under which they are to be moved. Some of these yards are operated by gravity, cars being pushed over a "hump" or slight elevation at one end of the yard and by force of gravity shunted on to desired tracks.

In large cities separate yards and freight houses are maintained for inbound and outbound traffic, and in some of the more important centers the large system railroads maintain separate yards and freight facilities for concentration purposes. Thus, import traffic "in bond" will be received at a warehouse or freight depot devoted to that traffic alone, and the train hauling such freight inland will be designated appropriately. In cases of extensive export traffic, a concentration point will be established inland and a solid train of export traffic destined for a given point will be known as "Pier 50 train" and run through to the pier at which the foreign-going steamer docks, the tracks and other facilities of railway carriage being so arranged in connection with the pier that the export shipments may be transferred direct from the cars to the vessel.

§ 5. "Peddler-Car Service."

The so-called "peddler-car" service is a special form of transportation service adaptable to the needs of the packing-house industry. This special form of service originated in Western Trunk Line territory, where it has been in vogue for many years. The original arrangement permitted the sale from the cars, as peddlers sell from wagons, of fresh meats and packing-house products. Subsequent conditions worked changes in this original system. The

growth of the business and economy in operation of the railroad demanded that sales should be made prior to the shipment of the car, with consignment of each package in the load to a particular consignee.

The general practice is for peddler-cars to move from the packing houses on certain days of the week, and the loading depends upon sales made in advance. When the packing-house receives from its salesmen, who are taking orders in the territory subject to peddler-car service, a sufficient quantity of tonnage to justify the peddler-car, arrangements are made with the carrier for the service, the packer loading one of his own refrigerator cars equipped with the necessary appliances for the service required, such as meat hooks, racks, etc.

The preparation of the car for peddler-service is as follows: The car is iced (a refrigerator car being used in all cases), loaded by the packer with his products, and turned over to the carrier for movement. The packer not only pre-cools the car, fills the bunkers with the necessary ice and salt, at his own expense, but must stand the cost of re-icing in transit. The average number of consignments in a peddler-car is less than one hundred, and care must be exercised at all times in the loading of these cars not to incur deficiencies in weight, because the carriers establish a minimum weight for such cars, and failure to include the minimum load in the car defeats the peddler-car basis of rates and causes the several consignments to take their regular merchandise rates. The packer may still run the car at carload rates by paying on sufficient additional weight to meet the minimum requirement.

The movement of the peddler-car consists in forwarding the car by fast freight service to the first destination to which there is a consignment, after which it is handled as way freight and the various shipments unloaded by the

carriers at the points to which the consignments are billed. These peddler-cars are, in most instances, returned empty to the packer at the origin point, the carriers paying the packer or owner of the car one cent a mile for both loaded and empty movements. While there are many long and short movements in the peddler-car service, the average route is from 275 to 280 miles.

Each of the articles contained in the peddler-car is billed at the less-than-carload rate applicable to that commodity, the average load containing from 25 to 40 per cent. of fresh meat.

The manner in which the charges for the peddler-car service are computed is worthy of notice. The rules in Western Trunk Lines Exceptions to Western Classification aptly illustrate this particular feature. An advance in the peddler-car minimum weight from 10,000 pounds to 12,000 pounds was denied by the Interstate Commerce Commission, in I. & S. Docket No. 419, decided December 21, 1914. The required loading in such cars consists of packing-house products, fresh meats, butterine, dressed poultry, mincemeat, neat's foot oil, lard oil, tallow oil, etc. Any deficit in weight in loading the car to the required minimum is charged for at fourth class rate to the first station for which the car contains a shipment. A minimum charge is also fixed, at not less than the charges on 10,000 pounds at the fourth-class rate, from point of shipment to final destination of the car, and in computing charges on this minimum basis consignments for points beyond the destination of the car or for points on branch or connecting lines are computed as if destined to the destination of the cars or to the points of delivery to branches or connections. In the investigation of the Commission in I. & S. Docket No. 419 it developed that from 66⅔ to 75 per cent. of shipments in peddler-cars are loaded

to ten thousand pounds or more, and that the average earnings to the carriers on these cars are in excess of the average received by the railroads on all less-than-carload freight, even taking into consideration the mileage paid for the use of the cars.

See in this connection:

Western Trunk Line Rules, 34 I. C. C. Rep. 554.
Rules Governing Packing House Products, 32 I. C. C. Rep. 428.
Corp. Com. of Okla. et al. vs. A. T. & S. F. Ry. Co. et al., 23 I. C. C. Rep. 656.

§ 6. "Stop-Car Service."

See "Reconsignment Service and Rules Governing Same," Chap. VIII, Part 2, "Special Freight Services."

CHAPTER IV.

CAR EQUIPMENT AND SUPPLY.

§ 1. Nature of Car Equipment.
§ 2. Common Law Duty of Common Carrier to Furnish Cars.
§ 3. Duty of Carriers under the Act to Regulate Commerce to Furnish Cars.
(1) Carriers Need not Furnish Tank Cars to Shippers.
§ 4. Jurisdiction and Authority of the Interstate Commerce Commission over Distribution and Supply of Equipment and Cars.

CHAPTER IV.

CAR EQUIPMENT AND SUPPLY.

§ 1. Nature of Car Equipment.

The broad requirement resting upon the carriers to provide whatever equipment may be necessary for such transportation service as their traffic demands causes the carriers to maintain and operate many different kinds of cars. The carrying equipment of a modern American railway system consists of ordinary box cars, including several different types, such as furniture cars, automobile cars, etc., flat cars, gondola cars, slatted-cars, dump-cars, live stock cars, poultry cars, trussed flat-cars, and special cars, such as tank cars, refrigerator cars, ventilator cars, etc. Each carrier lists in the Official Equipment Register, which is now filed under an Interstate Commerce Commission number, its different kinds, styles and sizes of cars in the order of car numbers by series. However, much of the value of this register to the shipper in the selection of a particular car is destroyed because of the universal practice of interchanging equipment between the railroads throughout the country.

A carrier must provide itself with sufficient equipment for the demands of its traffic, and not merely such equipment as will move the traffic, or a particular kind of traffic, during an abnormally low period. Moreover, the carrier's equipment should be offered to the public in good repair

and suitable condition for the transportation required. The nature of the equipment must meet the requirement of adequacy from every proper standpoint in transportation, i. e., kind of equipment, size, carrying capacity, adaptability to traffic necessities and condition for use.

The latest expression of the Commission upon this phase of the transportation problem is found in the case of Penna. Paraffine Works vs. Penna. R. R. Co., 34 I. C. C. Rep. 179, where it held that the carrier must furnish all necessary equipment, both ordinary and special, upon reasonable request. In this case the Commission held that the question of what is a reasonably adequate car supply is an administrative one of which it alone can take original jurisdiction.

Shippers at large suffer more frequently and more disastrously from car shortage than from any other physical defect in our transportation system. The question of carriers providing themselves with adequate equipment has frequently been before the Commission and has also been the subject of consideration by many of the state commissions. So complex has become the railroad structure of the United States and so enormous the development and expansion of traffic that during periods of extreme commercial activity the available car supply of the country is sadly inadequate.

§ 2. Common Law Duty of Common Carrier to Furnish Cars.

It is the common law duty of every carrier which offers and undertakes the transportation of property to furnish a proper and adequate supply of cars to handle and transport such property with all reasonable despatch and safety, and for its failure so to do the carrier is liable for injury suffered by the shipper thereby.

Scofield et al. vs. L. S. & M. S. R. Co., 2 I. C. C. R. 90, 2 I. C. R. 67.
Re Charges for Trans. of Fruit, 10 I. C. C. R. 360.
Same, 11 I. C. C. R. 129.
Rice vs. L. & N. R. Co., 1 I. C. C. R. 503, 1 I. C. R. 722.
Indept. Refrs. Assn. vs. W. N. Y. & P. R. Co., 4 I. C. C. R. 162.
Truck Farmers' Assn., etc., vs. N. E. R. Co., etc., 6 I. C. C. R. 295.

"A railroad which lives by virtue of a public grant and the exercise of quasi-public powers is primarily obligated to discharge its functions with an eye to the welfare of the public which it serves and to avoid any policy of operation which, no matter how profitable to the stockholder, may result injuriously to its dependent communities."

Re Car Shortage and Other Insufficient Transportation Facilities, 12 I. C. C. R. 561, 567.

§ 3. Duty of Carrier Under the Act to Regulate Commerce to Furnish Cars.

Under Section 1 of the act, as now amended (June 18, 1910), the duty of the carrier subject to the act to furnish equipment and cars, commensurate with the necessities of the traffic it undertakes to transport, has been statutorily imposed. "It shall be the duty of every carrier subject to the provisions of the act to provide and furnish such transportation (which is defined to include cars and other vehicles and all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof) upon reasonable request therefor, and to establish through routes and joint and reasonable rates applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to the exchange, interchange and return

of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto."

Act to Reg. Com. (Amd. 1910), Sect. 1.

As we have hitherto noted, the provisions of the act insofar as they relate to the duties and obligations of carriers, are broad and comprehensive of the great purpose of the statute—freedom and equality in the public use of the transportation service of the carriers. The act makes it mandatory upon the carrier to furnish proper and adequate equipment to meet the requirements of its traffic. The carrier, upon whose line shippers are located, must assume the responsibility for furnishing necessary cars and transportation facilities, and such cars and facilities must be in suitable condition to perform properly and safely the required transportation service. Upon the initial carrier falls the burden of furnishing equipment in suitable condition to comply with the requirements of the act.

Grain Elev. Allowances, at Kansas City, 34 I. C. C. Rep. 442, 446, 447.

Vulcan Coal and Mining Co. vs. I. C. R. R. Co., 33 I. C. C. Rep. 52, 71.

Wabash Sand and Gravel Co. vs. V. R. R. Co., 31 I. C. C. Rep. 344, 346.

Five Per Cent Case, 31 I. C. C. Rep. 351, 377.

Minimum Weight on Fresh Meats, etc., 30 I. C. C. Rep. 349, 350.

C. & N. W. Ry., Reconsigning Rules, 29 I. C. C. Rep. 620, 624.

Bolett Co. vs. C. R. I. & P. Ry. Co., 27 I. C. C. Rep. 11, 13.

Proportional Rates, etc., 26 I. C. C. Rep. 44, 45.

Coal Rates on the Stony Fork Branch, 26 I. C. C. Rep. 168, 174.

S. W. Missouri Millers' Club vs. St. Louis and S. F. Ry. Co., 26 I. C. C. Rep. 245, 250.

Atlas Lumber & Shingle Co. vs. N. P. Ry. Co., 26 I. C. C. Rep. 313, 314.

Eagle Pass Lumber Co. vs. National Rys. of Mexico, 25 I. C. C. Rep. 5.
In re Advances on Potatoes, 25 I. C. C. Rep. 159, 169.
Galveston Com'l Assn. vs. A. T. & S. F. Ry. Co., 25 I. C. C. Rep. 216, 228.
In re Mine Ratings 25 I. C. C. Rep. 286, 291.
In re Western Class. No. 51, 25 I. C. C. Rep. 442, 443.
Riverside Mills vs. G. R. R., 25 I. C. C. Rep. 434, 435.
I. C. R. R. Co. vs. River and Rail Coal and Coke Co., 150 S. W. Rep. 641.
Colorado Coal Traffic Assn. vs. D. & R. G. R. R. Co., 23 I. C. C. Rep. 458, 463.
Brunswick-Balke-Collender Co. vs. A. T. & S. F. Ry. Co., 23 I. C. C. Rep. 395, 397.
Albree vs. B. and M. R. R. Co., 22 I. C. C. Rep. 303, 327.
Balfour, Guthrie & Co. vs. O. W. R. R., 21 I. C. C. Rep. 539.
Arlington Heights Fruit Exchange vs. S. P. Co., 20 I. C. C. Rep. 106, 117.
Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. Rep. 356, 361.
Peale, Peacock & Kerr vs. C. R. R. Co. of N. J., 18 I. C. C. Rep. 25, 34.
American Creosoting Works vs. Ill. Cent. R. R. Co., 15 I. C. C. Rep. 160, 164.

The Interstate Commerce Commission is vested with broad powers and wide discretion. It is essentially and primarily an administrative body, exercising powers which are legislative in their nature and which are delegated to it by Congress and limited by the terms of the delegation. While it is clearly the duty of the Commission to observe and enforce the substantive and definite provisions of the act, due consideration must be had of the spirit and letter of the law. There must, of necessity, be a limit beyond which the carrier's duty to furnish equipment may not pass. Indeed, a railroad's car supply may be legally sufficient and yet not sufficient to meet the demands of shippers in unforeseen contingencies, fluctuations in the demand for transportation, etc. Equipment off line might render impossible the carrier's ability to meet the maximum demand.

Again, the matter of the individual unit in the equipment supply is a factor, for, generally speaking, freight cars should be made to fit the business, and, within reasonable limits, the business may be required to adapt itself to the car.

From a tariff standpoint the carriers hold themselves out to furnish cars of various sizes and graduate their charges according to the size of the car. Thus they have conferred upon the shipper a legal right to demand a car of certain size. A broad and reasonable view must be taken of this paramount obligation of the carriers. The operation of railroads is inseparably bound up with the commerce of the country. Changing conditions, ever prevalent and never uniform, greatly vary the demands upon the railroads. The administration of the law should seek a workable way to promote both commerce and transportation from this standpoint. Under the present scheme of regulation the railroads have been left to provide themselves with equipment by purchase, lease or rental, and all well managed railway systems are presumed to have provided themselves with such facilities and equipment as will on the whole permit them to serve their patrons and earn the largest possible revenue, with proper consideration for judicious investment and proper economies. The demand for cars varies in different parts of the year, and often as between different years, dependent upon general business, crop and climatic conditions.

Despite the many manifestations of its authority by the Commission to require the carriers to furnish adequate equipment, it is not the opinion of the authorities that it possesses the power to require a carrier to enlarge its facilities or services; nor has the Commission the power to award damages against a carrier for failure so to do.

If we analyze the regulatory laws down to their prime

purpose it is clear that they insure the public against unreasonable charges and secure service for the public that is free from unjust discrimination and undue prejudice. The regulation of the use of "railroad" facilities in the function of "transportation, as defined in the act, is the plain purpose of the regulation rather than the extension of any railroad lines or the enlarging of its transportation field. In the language of the act requiring the construction, maintenance and operation of switch connections, the words "to furnish cars for the movement of such traffic to the best of its (the carrier's) ability," show the lawmakers recognized the fact that the carrier may not and probably will not be able to furnish desired cars. The tendency in the more recent rulings of the Commission to lead the lay-public to believe its authority will eventually lead to the absolute requirement in the administration of the act that the carriers shall furnish transportation and equipment and facilities therefor and compel the acquisition by carriers of additional equipment, is recognizable. Until the act is made supreme over the property right of the carriers in the "railroads" and equipment and this effected through a tribunal of greater judicial scope than the Interstate Commerce Commission, it will be well said that the utmost obligation that the law lays upon the carrier is to equip itself with sufficient cars, not to meet the hopes and expectations of the shipper, but to meet his actual requirement under normal conditions, avoiding unjust discrimination in its treatment of the individual shipper or of a class of shippers.

(1) Carriers Need Not Furnish Tank Cars to Shippers. In the Pennsylvania Paraffine Works Case, *supra*, it was attempted, under Section 13 of the act, giving to any person complaining of anything done or omitted to be done by a common carrier in contravention of the provi-

sions of the act the right to apply to the Interstate Commerce Commission for redress, to bring into issue the failure of the Pennsylvania Railroad Company to furnish tank cars to certain shippers of petroleum products. The Commission reached a finding adverse to the carrier and entered an order against the Pennsylvania Railroad Company directing it to cease and desist from refusing, upon reasonable request and notice, to provide and furnish tank cars to the Crew-Levick Co. and the Pennsylvania Paraffine Works for interstate shipments.

The Commission followed its former ruling in the Vulcan Coal & Mining Co. Case, *supra*. In that case it held that the power to require the "carrier to furnish all necessary equipment, both ordinary and special, upon reasonable request" was vested in the Commission. But in the Paraffine Works Case, after finding that the Pennsylvania Railroad Company was guilty of a discriminatory practice in the distribution of cars, the Commission further found that this carrier was guilty of an unjust and unreasonable practice in *not possessing* or in *not acquiring* and furnishing tank cars in sufficient number to meet the requirements of the complainants' business.

The decision of the special court in this case (District Court of the United States for the Western District of Pennsylvania, consisting of Circuit Judge Wooley and District Judges Orr and Thomson) is important since it is a step in the eventual clearing up of the question by either the Supreme Court of the United States or by Congress. While there are many authorities at the present time who agree with the District Court's interpretation of the act as it stands, it is confidently expected, in the event the Supreme Court of the United States affirms the District Court's ruling, that Congress will change the law so that there will be no question about its determina-

tion to make it cover special equipment, such as tank cars, no matter to what expense the carriers may be put, upon the ground that the public ultimately will bear the expense in the compensation paid by the shippers for transportation service.

The decision of the court is worthy of quotation in full and is instructive in many ways with respect to several doubtful questions.

Judges Wooley, Orr and Thomson; Thomson dissenting: "The question in this case, in the abstract, is whether the Act to Regulate Commerce, as amended, imposes upon a carrier the duty to acquire and to provide and furnish transportation of a type that physically or economically is best adapted to the needs and uses of the shipper, of which the Interstate Commerce Commission is the judge. The precise question is whether the Interstate Commerce Commission has power to compel the Pennsylvania Railroad Company to purchase and acquire tank cars for the shipment of oil, and to provide the same to complaining shippers upon request which the Commission may adjudge reasonable.

"For the validity of its order the Interstate Commerce Commission relies upon several provisions of the Act to Regulate Commerce, as amended, and upon certain changes and differences in the act created by its amendments. The first section of the act, both in its original and amended state, contains definitions of different branches of the subject with which the act deals. The terms 'common carrier,' 'railroad' and 'transportation' are, by express language, given their statutory meaning. Section 1 of the act of 1887 provided that 'the term "transportation" shall include all instrumentalities of shipment or carriage.' As amended by the act of 1906 the term 'transportation' is enlarged and is made to 'include cars

and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all service in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.' Having stated of what transportation consists, the section prescribes it to 'be the duty of every carrier to provide and furnish such transportation upon reasonable request therefor.'

"Excerpts from several opinions of the Supreme Court were cited in support of the government's contention that a railroad company, holding itself out as a carrier, is under a legal obligation arising out of the fact of its employment, to provide transportation means and facilities commensurate with the demands of shippers, without regard to whether they possess them or have the money with which to acquire them. These excerpts were, of course, not cited as decisive of the question in issue, because, upon examination, it is disclosed that the cases from which they were taken were decisive of matters altogether different.

"These expressions of the Supreme Court, standing alone and considered without reference to the fact of the case in which they appear, seem to support the government's contention, but an examination of the cases discloses that the suitable and necessary means and facilities which the Supreme Court has said the carriers must provide have special reference and relation to the facts of those cases, which in nearly every instance present questions of discrimination or of 'service in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported,' as specifically provided by the statute. In none of them was the question raised or

decided, nor in any did the Supreme Court reveal its opinion as to whether there devolved upon a carrier a statutory duty to provide and furnish transportation in order to provide and furnish the same upon reasonable request.

Railroad vs. Pratt, 22 Wall 123, 128.
Covington Stock Yards Co. vs. Keith, 139 U. S. 128, 133.
Arlington Heights Fruit Exchange vs. Southern Pacific Co., 20 I. C. C. 106, affirmed by the Supreme Court in Atchison Ry. Co. vs. United States, 232 U. S. 199.
Chicago, Rock Island & Pacific Ry. Co. vs. Hardwick Farmers' Elevator Co., 226 U. S. 426.
Missouri, Kansas & Texas Railway Co. vs. Harris, 234 U. S. 412, 418.
Yazoo & Mississippi Valley R. R. Co. vs. Greenwood Grocery Co., 227 U. S. 1.
St. Louis, Iron Mountain & Southern Ry. Co. vs. Edwards, 227 U. S. 265.
Hampton vs. St. Louis, Iron Mountain & Southern Ry. Co., 227 U. S. 456.
Penn. Refining Co. vs. Western New York & Pennsylvania R. R. Co., 208 U. S. 208.
Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.
Baltimore & Ohio Railroad Co. vs. United States, Ex Rel. Pitcairn Coal Co., 215 U. S. 481.

"There is thus presented for decision, with little if any aid from previous deliverances by the courts, the original question which divided the Interstate Commerce Commission in this case and in the case of Vulcan Coal & Mining Co. vs. I. C. R. R. Co., 33 I. C. C. 52, whether the duty imposed upon a carrier to provide and furnish cars to the shipper is the duty imposed by the common law or is a different and a broader duty prescribed by the statute, and whether the power of the Interstate Commerce Commission to prevent undue preference and unjust discrimination in the use of a carrier's cars has been enlarged and ex-

panded into a power to control the 'practice' of carriers by determining and prescribing the type and character of 'all (their) instrumentalities and facilities of shipment or carrier,' in order to procure for the shipper a better, safer and more economic transportation service.

"In seeking the authority of the Commission to make the order in controversy we have nothing to do with the merit of the order, the injustice of the practice found to exist or the wisdom of the practice established (Texas & Pacific Ry. Co. vs. I. C. C., 162 U. S. 197, 219; I. C. C. vs. Alabama Midland Ry. Co., 168 U. S. 144, 170), nor have we anything to do with the effect of the order upon private car lines. We are concerned only with the law under which the order was made and the Commission acted, assuming its finding of fact to be conclusively correct. I. C. C. vs. Illinois Central Ry. Co. 215 U. S. 452; Baltimore & Ohio Railroad Co. vs. United States ex rel. Pitcairn Coal Co., 215 U. S. 481; Pennsylvania Co. vs. United States, 236 U. S. 351, 361.

"The question of the duty of the carrier and the correlative question of the Commission's power to enforce the performance of that duty, as they are presented in this case, had their rise in a change in the definition of the term 'transportation' made by the amendment of 1906. Section 1 of the original act prescribed that 'the term "transportation" shall include all instrumentalities of shipment or carriage.' Instrumentalities of shipment, of course, include cars, and cars have been treated as such from the date of the act to the date of its amendment in 1906. But in Scofield vs. Lake Shore & Michigan Southern Railway Co., 4 I. C. C. Rep. 158, 2 I. C. Rep. 67, 76, the Interstate Commerce Commission did not clothe it with power to determine the instrumentalities of shipment to be employed by a carrier or to require a carrier to use

in its business the kind and number of cars which the Commission may deem necessary for a proper car service. In discussing this case the Commission said that 'the power, if it should be held to exist at all, on the part of the Interstate Commerce Commission to require a carrier to furnish tank cars when that carrier is furnishing none whatever in its business, would apply equally to sleeping cars, parlor cars, fruit cars, refrigerator cars, and all manner of cars as occasion might require, and would be limited only to the necessities of interstate commerce and the discretion of the Interstate Commerce Commission. A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of those in the statute.'

"It is contended, however, that by the amendatory act of 1906, changing the definition of the term 'transportation,' there is such direct statutory expression conferring such extraordinary power, and that the measure of duty theretofore resting upon the carrier to furnish cars was changed from a common law duty, with resort to the courts for its violation by the Interstate Commerce Commission. The act of 1906, as before quoted, prescribes that 'the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage' and certain defined service to be rendered in connection therewith. The services defined are the principal additions to the definition, and relate to the receipt, delivery, transfer, ventilation, refrigeration, storage and handling of property transported. With these we have nothing to do in this case, except to note that they constitute the principal, if not the entire additions to the old definition, and are subject matters of the Commission's control not embraced in the original act. While

the word 'cars' was not used in the definition of transportation as contained in the original act, it has never been doubted that in the words 'instrumentalities of shipment' and within the term 'transportation' cars were included.

"The definition of the term 'transportation' as it appears in the amendment of 1906, so far as it relates to cars, does nothing more than express what was implied in the original definition, and contains nothing which suggests that in furnishing transportation there shall rest upon the carrier a duty to furnish cars of a kind different from those required of the carrier under the original act.

"We find no case prior to the amendatory act of 1906 which questioned that cars were instrumentalities of shipment or carriage. If such a question existed, then the act of 1906 naming cars as one of the instrumentalities of shipment might have been a change with a purpose creating a difference in legal effect.

"In seeking the effect of the amendment of 1906 inquiry may be made with respect to the purpose of Congress in enacting it. It is apparent from the addition of the definition of 'transportation' contained in the amendment that Congress intended, and clearly succeeded in including within that term certain services which therefore had not been embraced with it, and over which Congress deemed it advisable that the Interstate Commerce Commission should have power and control. These were ventilation, refrigeration, icing, storage and handling of property transported. This power was conferred upon the Commission for the avowed purpose, among other, of relieving the shipper of the task and annoyance of dealing with more than one person. These were new matters and therefore were defined in the original act. But the addition of the word 'cars' in the amendment made no addition

to the definition in the original act, because cars were already embraced within it.

"We find nothing in the original or amended act which, by express language, imposes upon a carrier the extraordinary duty or confers upon the Interstate Commerce Commission the extraordinary power claimed by the government in this proceeding. If they exist, there can be found only by implication an intention to impose so onerous a duty and to grant so great a power. On the other hand, we find in the act, by clear expression, duties imposed, but (they) are qualified by the ability of the carriers to conform to the duties prescribed.

"The provisions of the act requiring a carrier to maintain and operate switch connections with lateral or branch line railroads, appearing in the last paragraph of the first section of the act, imposes upon a carrier the duty to 'furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shippers.' The words, 'to the best of its ability,' of course, qualify the duty to maintain switch connections, and do not qualify the prohibited discrimination.

"Again, in Section 3 of the act, it is provided that 'every common carrier shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding and delivering of passengers and property.' Here again the carriers' duty to provide and furnish facilities of transportation is not absolute. The duty is laid upon them 'according to their respective powers.' Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and, if they did not have them, to acquire them whether they had the money

or not. Restricting our construction of the act to its words, and finding nothing by implication that changes or qualifies their meaning, we are of opinion that the amendment of 1906, including cars within the defintion of 'transportation,' added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the Commission, and vested in the Commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater duty is imposed upon a carrier with respect to furnishing and providing cars than was prescribed by the original act, then the practice of the carrier found unlawful in this case was not in violation of the statute, and the order of the Commission directing the carrier to desist from that practice was an exercise of power not conferred by law.

"The Act to Regulate Commerce does not confer upon the Interstate Commerce Commission all power over cars and other instrumentalities of shipment. Congress has reserved unto itself, and from time to time has exercised, power to control and regulate certain instrumentalities of shipment, notably by the acts establishing the standard height of draw-bar, prescribing safety appliances and regulating the hours of service of the carriers' employes.

"But aside from special enactments of this class, federal legislation regulating commerce, insofar at least as it is contained in the act of 1887 and its amendments, has thus far left carriers free to exercise their own judgment in the purchase, construction and equipment of their roads and in the selection of their rolling stock. By this legislation federal control has been assumed over the use to which the carriers' roads and equipment are put, to the end that the flow of commerce, in the employment of those instrumentalities, may not be impeded, and that unjust rates shall not be charged and unfair practices pursued to the

injury of persons and localities. The law clearly confers upon the Commission power to so regulate the use of the facilities possessed by the carrier that there shall be no unjust discrimination, but we find nothing in the law which confers upon the Commission power to compel carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preference, but in order that the shipper may have larger, better and perhaps more economical facilities. We are of opinion that in making the order the Interstate Commerce Commission exceeded its statutory power, and that the order should be suspended and annulled in accordance with the prayer of the petition."

The dissenting opinion is of value as a learned argument in favor of the Commission's assumed authority.

Thomson, Judge, dissenting:

"Finding myself unable to concur in the conclusion reached by the majority of the court, I have thought proper, in view of the importance of the case, to briefly assign the reasons which control my judgment.

"We have nothing to do with the wisdom of the order. The findings of the Commission are presumed to be true, and to have justified its action, if only the power to exercise it exists. On this question of power alone the Commission was divided. If there rested no legal duty on the carrier to provide the transportation called for, it follows that the Commission was without power to make the order in question. The conclusion of the court adverse to the action of the Commission is concisely set forth in the concluding portion of the majority opinion thus:

" 'The law clearly confers upon the Commission power to so regulate the use of the facilities possessed by the carrier that there shall be no unjust discrimination, but we find nothing in the law which confers upon the Com-

mission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better and perhaps more economical facilities.'

"This is the issue, and the solution of the question must be found mainly in the proper interpretation of the term 'transportation,' as used in the amendment of 1906.

"In the original act of Feb. 4, 1887, it is said: 'The term "transportation" shall include all instrumentalities of shipment or carriage.' These words are clearly comprehensive enough to include cars as an instrument of shipment. But we need not stop to conjecture as to their full breadth and meaning. It is sufficient that Congress thought proper to enlarge the scope of the term 'transportation' by providing in the act of 1906 as follows: 'The term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all service in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported, and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.'

"This, instead of being a concise and accurate definition of the term 'transportation,' is rather a legislative declaration of what the term shall include. Much broader than the words, 'all instrumentalities of shipment and carriage,' in the original act, are the words of the amendment, 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage.' The very comprehensive words,

'facilities of shipment and carriage,' was a significant addition to the original act. These words are again made more comprehensive by the words which follow, 'irrespective of ownership or of any contract, express or implied,' and are thus to be regarded as the instruments of the carrier; and the shipper, as well as the Commission, is thus relieved of the annoyance of dealing with more than one person. The scope of the term transportation is again enlarged by the use of the words, 'and all service in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.'

"Having thus defined transportation, it is then declared to be the duty of every carrier subject to the provisions of the act to provide and furnish such transportation upon reasonable request therefor.

"Whatever may have been the duty resting on a carrier at common law to furnish transportation for the shipper's property, it admits of no doubt that the furnishing of transportation, as defined by the act, has been made a clear statutory duty of the carrier. As was said by Chief Justice White in Chicago, R. I. & Pac. R. R. Co. vs. Hardwick Farmers' Elevator Co., 226 U. S. 426:

" 'The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is, of course, by these provisions, clearly declared. Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to Regulate Commerce give remedies for the violation of that duty.'

"It is plainly the duty of the carrier not only to furnish cars on reasonable request, but to furnish cars reasonably suitable for the proper transportation of the freight to be

shipped. This general proposition is stated by Hutchinson on Carriers, Sec. 536, as follows:

" 'If the goods are of such a nature as to require for their protection some other kind of car than that required for ordinary goods, and cars adapted to the necessity are known and in customary use by carriers, it is the duty of the carrier, where he accepts the goods, to provide such cars for their carriage.'

"In Covington Stock Yards Co. vs. Keith, 139 U. S. 128, Justice Harlan, speaking for the Supreme Court, said:

" 'The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public.'

"In the same opinion, the court says:

" 'The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well to the necessities of the respective localities in which it is received and delivered.'

"This case, assuming that proper facilities of the transportation of the stock must be furnished, goes further and extends the duty of the carrier to providing suitable means for its receipt and discharge.

"If, then, it is the duty of the carrier on reasonable request to furnish coal cars to the shipper of coal; stock cars to the shipper of live stock; fruit cars, with refrigera-

tion, for the shipper of fruit, on no principle should the oil shipper be denied cars reasonably suited for the shipment of oil. The word 'reasonable,' as used in the act, is a qualifying and saving term. Not merely the demands and needs of the shipper are to be considered, but the circumstances of the carrier and the rights of the public as well. The fitness and efficiency of the transportation requested; whether the facilities of shipment would be made better and more economical; the public advantage to be derived therefrom; the cost and expense in relation to the benefit resulting; all the circumstances, time and place and means as affecting the carrier and its ability to supply the transportation demanded—these and all other relevant matters may be considered in determining the reasonableness of the shipper's demand. If the request be reasonable, it is the legal duty of the carrier to comply with it; if unreasonable, no such duty devolves upon the carrier. And this question of fact, in case of dispute, the Commission must decide. Almost all duties are relative rather than absolute, and the exercise of a clearly vested power largely depends upon the facts which call for its exercise. Even the clearly expressed duty of the carrier to furnish cars on reasonable request is not absolute. Hampton vs. St. L., Iron Mt. & S. Ry. Co., 227 U. S. 456. Thus the right of the shipper to demand transportation, on the one hand, is conditioned on the fact that his request be reasonable; and the duty, on the other, to comply is not absolute, but dependent on the facts of the case. We are not passing on some abstract proposition as to the power of the Commission to order, without restraint, the equipment and furnishing of cars, without reference to conditions or circumstances. We are passing on a concrete question based on specific facts, conclusively found by the Commission. It would be easy to imagine on the part of a shipper an

unwarranted and unreasonable request, and on the part of the carrier an arbitrary and unjust denial of a reasonable demand. The Interstate Commerce Commission is the tribunal standing between the parties, with power to hear and determine, and especially competent by reason of experience to determine with justness and uniformity of decision.

"I cannot agree with the position that the duty imposed upon the carrier to furnish cars is limited to those which the carrier may have on hand, or that there is no obligation to acquire facilities it does not possess, or to acquire better facilities to meet the reasonable demands of the shippers. I base my conclusion on the words of the act itself, 'It shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation on reasonable request thereof.' No words more specific or definite than 'provide and furnish' could have been chosen. I find no limitation of any kind in the act upon the duty thus imposed upon the carrier, except only that the request therefor be reasonable. There are no words from which it can fairly be assumed that existing ownership or control is a prerequisite to the carrier's duty to provide and furnish. From the explicit words of the act, it would seem to follow that if a reasonable request is made for cars, and the carrier does not possess them, it must acquire them for use by one of the many methods for their acquisition. If not, this most important provision of the statute would be rendered largely nugatory.

"Perhaps the most effective blow which Congress could deal at discrimination in interstate traffic is the duty imposed on the carrier to furnish transportation. There could be no more prolific source of discrimination practices than the right in the carrier to grant or withhold the

means of transportation at its discretion, the demands of the favored shipper would be met by promptly acquiring and furnishing the transportation called for. We do not have what you demand, would be a conclusive answer to the less favored. The flow of commerce is more vital than that it be free from discrimination and preference. If the primary object of the act is to prevent discrimination, Congress evidently realized that the most effective method of prevention is to remove the opportunity for discrimination. We must assume that if Congress had intended to set limitations on that duty it would have done so in apt words, as it did with reference to other provisions of the act. For instance, the duty of the carrier to construct and operate switch connections with any lateral branch line of railroad or private sidetrack is conditioned that such connection is reasonable, practicable, and can be put in with safety, and will furnish sufficient business to justify the connection and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability. Again, the carrier's duty to furnish facilities for the interchange of traffic between their respective lines is qualified by the expression, 'according to their respective powers.' It is highly significant, therefore, that the more important duty to furnish transportation has no limitation or condition, except upon the reasonable request of the shipper.

"If the wisdom of the order in question, or its necessity, needed justification, it appears in the conclusive findings of the Commission that 91 per cent of the refined oil of the country is shipped in tank cars at a great economic gain. I would therefore dismiss the petition of the complainant company."

§ 4. Jurisdiction and Authority of Interstate Commerce Commission Over Distribution and Supply of Equipment and Cars.

Under the amended fifteenth section of the Act to Regulate Commerce, as that section was reconstructed by Congress in its amendment to the act of June 29, 1906, the Commission was empowered to declare any regulation or practice of a carrier which was unjustly discriminatory or unreasonable to be unlawful and to prescribe a reasonable and proper regulation or practice *in futuro* (for a period of two years). This same section was in effect rewritten in the amendment of 1910, which but served to further strengthen the authority of the Commission in the promulgation of remedial orders in cases where unreasonable or unjustly discriminatory regulations and practices by carriers were found to exist.

This power in the Commission is inclusive of any rule, regulation or practice of an interstate carrier under which it offers its services to the shipping public and conducts its transportation. Hence, the Commission has jurisdiction and control of the practices of carriers engaged in interstate transportation regulating the distribution of their cars to shippers, since the basis of car distribution is a regulation affecting rates within the meaning of Section 15. While it may be said with some force that the scope to which the Commission has gone in its physical application of its authority to regulate the distribution of carriers' equipment necessitates a very broad reading of the fifteenth section, as amended, the fact is no longer open to argument that the Commission is charged with seeing to it that the law's mandate that the shipper is entitled to an equal or a justly ratable use of the facilities of interstate carriers and the assurance also that no other shipper shall

fare ratably better at the hands of the carrier is carried out in the distribution of cars.

It would seem sufficiently said that since the Congress of the United States has made it the duty of a common carrier engaged in interstate transportation to furnish cars suitable for the traffic, and the distribution of cars is a practice directly affecting rates over which the Commission has exclusive control, the power of the Commission to administratively enforce the intention of Congress can not be controverted. And this is in all essentials expressive of the attitude of the courts in construing and interpreting the statute.

Both the courts and the Commission have interpreted the act to the effect that the regulation of car distribution is within the governmental power. In the Hillsdale Coal & Coke Company Case (19 I. C. C. Rep. 356) the Commission held that its jurisdiction over car distribution rules is absolute.

Penna. Paraffine Works vs. Penna. R. R. Co., 34 I. C. C. Rep. 179.

Coal Rates on Stony Fork Branch, 26 I. C. C. Rep. 168, 176.

In re Irregularities in Mine Ratings, 25 I. C. C. Rep. 286.

Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. Rep. 86.

Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. Rep. 356.

Traer vs. C. B. & Q. R. R. Co., 14 I. C. C. Rep. 165.

Wholesale Fruit & Produce Association vs. A. T. & S. F. Ry. Co., 14 I. C. C. Rep. 410.

R. R. Com., etc., vs. H. V. R. R. Co., 12 I. C. C. Rep. 398.

Morrisdale Coal & Coke Co. vs. Penna. R. R. Co., 230 U. S. 304.

C. R. I. & P. Ry. Co. vs. Hardwick Farmers' Elevator Co., 226 U. S. 426.

Loomis vs. L. V. R. R. Co. (N. Y. 1913), 101 N. E. Rep. 907.

I. C. C. vs. I. C. R. R. Co., 215 U. S. 452 (affirming the interpretation of the Commission in 12 I. C. C. Rep. 398).

B. & O. R. R. Co. et al. vs. U. S., ex rel., 215 U. S. 481, hold-

ing that wrongs in the nature of discriminatory distribution of coal car equipment can not be redressed by the courts in advance of the action of the Commission.

See also 204 U. S. 426, reversing 165 Fed. Rep. 113, and 154 Fed. Rep. 108.

The recent decision of the Federal Court for the district of Pennsylvania, in the Paraffine Works Case, brought up the question of the Commission's authority to require the acquisition of equipment by the interstate carriers in order to furnish an adequate car supply, including both ordinary and special equipment. The court denied this power, as is explained in this chapter, Section 3, but in nowise demoted the Commission in the exercise of its power over existing equipment.

The constitutionality of the 1906 amendment to the act was presented to the courts upon the question of the Commission's power to reduce rates and fix maximum rates with non-discriminatory regulations governing such rates. In L. & N. R. R. Co. vs. I. C. C., 184 Fed. Rep. 118 (1910), the court ruled that in fixing a maximum rate to be charged by a carrier there was no restriction of the Commission's power in respect to the matters which it may take into consideration, and that the only curb upon the exercise of its authority should be that it should not abuse its power or proceed arbitrarily without regard to the justice of the case or give a judgment not fairly within its power. It held the power delegated by Congress to the Commission to prescribe railroad rates not legislative in its nature, and since it concerned the administrative affairs of the government, which, because of variable conditions were not susceptible to direct legislation, the delegation of authority to the Commission was not in violation of Art. 1, Par. 9, of the Constitution of the United States.

In I. C. C. vs. I. C. R. R. Co., 215 U. S. 452, the complainant alleged "that the operation of the defendant's rules and regulations governing the distribution of coal cars among the various coal mining districts on its lines results in giving to some of the districts a less than just proportion of available cars; and that, as applied to the distribution of cars allotted to the particular district in which the complainant is mining coal, the rules and regulations give an undue preference to some of the operators in that district and create an unlawful discrimination against others. The complainant therefore prays that these regulations and practices may be declared to be unlawful and that the defendant may be required by appropriate order to adopt a plan that will yield more equitable results. In its answer the defendant, while denying any inequality and unfairness in the distribution, raises the jurisdictional question by pleading that such matters are not within the scope of the regulative authority of the Commission.

"The point arises upon the first paragraph of Section 15 of the amended Act to Regulate Commerce (1906). Stripping the clause of unnecessary words and eliminating from it all matter not essential to this inquiry, the language upon which the argument of the defendant is based will stand out clearly and the question will more readily be apprehended. The clause will then read as follows:

" 'That the Commission is authorized and empowered, and it shall be its duty whenever, after full hearing upon a complaint made . . . it shall be of the opinion that any of the rates . . . demanded . . . by any common carrier . . . for the transportation of persons or property . . . **or that any regulations or practices whatsoever of such carrier or carriers affecting such rates,** are unjust or unreasonable, or unjustly dis-

criminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate . . . thereafter . . . to be charged; **and what regulation or practice in respect to such transportation is just, fair and reasonable to be thereafter followed**; and to make an order that the carrier shall cease and desist from such violation . . . and shall conform to the regulation or practice so prescribed.'

"The contention of the defendant is that its regulations and practices with respect to the distribution of coal cars among the various mines on its lines are not regulations or practices 'affecting rates,' and it therefore denies the authority of the Commission to intervene between it and its coal shippers with a view to controlling and reforming the manner in which the distribution is made. Its counsel says:

" 'The law confers no power to make any order with reference to any regulation or practice of the carrier not affecting rates. Regulations as to car distribution do not affect rates, and the Commission has, therefore, no power to describe what regulation or practice shall be followed with regard thereto.'

"The point is not altogether a new one. It has been pleaded in other cases although not seriously insisted upon in argument. But in this proceeding it is earnestly urged upon our attention by the defendant as decisive of the controversy and of the right of the Commission to enter an order. The question is one of very large importance. If the numerous and varied regulations and practices of carriers which enter so vitally into questions of transportation do not 'affect rates,' in the sense attributed by counsel for the defendant to that phrase, and therefore lie outside the jurisdiction of the Commission, our power to protect

the shipping public against abuses is much less extensive than has generally been understood. There is no more insidious or effective way by which a carrier may discriminate between its shippers than through a regulation or practice that denies to them the equal enjoyment of its facilities. And if the rules of carriers with respect to car distribution are not included within the scope of the law, the prosperity of shippers during periods of car shortage largely lies in the hands of the carriers on whose lines they conduct their business enterprises, whenever such carriers are disposed to and do actually favor some shippers at the expense of others. By giving to one manufacturer a larger proportion of cars than he is entitled to, when the volume of his traffic is compared with that of a competitor, his business may be encouraged and built up, while the business of the competitor may be destroyed if the Commission has no authority to intervene on his behalf. That there is need of such authority will appear from an examination of the published reports of proceeds in which the Commission has found just occasion to exercise it.

"The power upon complaint made to deal with unjust, preferential and discriminatory regulations and practices of carriers was clearly vested in the Commission under Section 15 of the act as it stood prior to the amendatory act of June 29, 1906. Whether or not it still exists under Section 15 of the amended act must be ascertained by examining the whole act as it now stands with a view to gathering the general intent and purpose of the enactment, and then examining the various provisions by which the intent and purpose are sought to be made effective. The underlying purpose of this legislation, as will doubtless be agreed, was to put shippers on a basis of absolute equality; to assure to them not only equal rates but an impartial enjoyment of the facilities and services of inter-

state carriers. That principle appears throughout the act, but nowhere more clearly than in Sections 2 and 3. The former assures to shippers an equality of rates for the transportation of property under substantially similar circumstances and conditions; and the latter assures to them an equality in the opportunity to use the rates, facilities and services of carriers. One right supplements the other. An equality in rates without an equal opportunity to use the facilities of carriers would fall far short of the general object sought to be accomplished by the Congress. On the other hand the right to impartial treatment by carriers in the transportation of their merchandise would mean little to shippers if not accompanied by an assurance of an equality also in rates. And when we approach the consideration of any special provision in the act this understanding of its general scope and purpose must not be lost sight of. As was said by Chief Justice Marshall in The Durousseau vs. United States, 6 Cranch, 307, 314:

" 'The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object some degree of implication may be called in to aid that intent.'

"But, while keeping in mind the general intent and spirit of the act, we are by no means to be understood as indicating that our power to deal with undue preferences and unlawful discriminations, when accomplished by carriers through unjust regulations and practices, rests upon implication; or that it is necessary by implication to inject into Section 15 explanatory words that are not embraced within its text. The language of that provision is entirely sufficient in itself to enable the Commission to redress wrongs of the character complained of in this proceeding. In reaching this conclusion we are not required to resort

to ingenuity in construction or to rest the argument upon a mere matter of punctuation as suggested by counsel. In our view any practice or regulation that unlawfully discriminates against one shipper and affords an undue preference to another shipper is a regulation or practice affecting rates within the meaning of that phrase as used in the clause in question. Any regulation or practice that withdraws from a shipper the equal opportunity of using and taking advantage of the rates offered by a carrier to the public is clearly a regulation or practice affecting rates in the sense in which the phrase is used in the amended act at the point in question. To hold otherwise, as the defendant urges, would be to put the narrowest possible construction upon those words, in disregard of the general object and purposes of the enactment. And this we are not warranted in doing under any recognized rule of statutory construction, and more especially when a remedial statute is under consideration. After having vested in the Commission the power to redress wrongs arising out of unreasonable and unjust rates, we are not ready to accept the view that the Congress has contented itself with a mere admonition in the law against the great wrongs that may be done against shippers through unjust regulations and practices. That, as counsel contends, is exactly what has happened. Although Congress has declared such practices to be unlawful, counsel insists that it has omitted to give us the power to correct them. Setting aside as beyond the reach of the Commission the great body of rules, regulations and practices of carriers that have to do with transportation, he says:

" 'Examples of regulations affecting rates are those fixing maximum and minimum carload weights, and that contained in the fourth class of the uniform bill of lading which provides that all property transported shall be

subject to necessary cooperage and baling at the owner's cost.'

"The maximum or minimum weight of a carload is not something affecting the rate, but is in fact a part of the rate, a factor which is just as essential to a correct statement of the rate as is the rate per 100 pounds itself. Nor do cooperage and baling affect the rate as such. They are simply special services performed by the carrier in transit when it is necessary to protect the shipment from damage or loss. Such services neither increase nor diminish the rate, but are charges entirely apart from the rate. No other examples of rules or practices affecting rates are vouchsafed us by counsel to illustrate his conception of the meaning of that phrase which in some way increases or diminishes the amount of freight charges that the shippers must pay on a shipment.

"The text itself does not justify that construction of the provision in question. It will be observed that the clause divides itself naturally into two parts; it authorizes the Commission, first, to consider the wrong alleged, and then to apply the remedy. If it shall be of the opinion after a full hearing that the regulation or practice complained of is unreasonable and unjust, the Commission may remedy the wrong by prescribing a just and reasonable regulation or practice thereafter to be followed by the carrier. In the first part of the provision reference is made to the regulations or practices 'affecting rates'; the remedy offered by the provision consists in the prescribing by the Commission of a just and reasonable regulation or practice with respect to 'transportation.' While there is here some contradiction in the words used, we do not understand that there is any contradiction in the real substance of the clause or in its meaning. Each part of the clause has a necessary relation to the other part, and the words

'regulations' and 'practices' as used in both parts must necessarily be used in the same sense. If they are not used it is difficult to see how wrongful regulation or practice 'affecting rates,' in the sense of affecting the amount of the freight charges on a shipment, could ordinarily be cured by the substitution, as the clause now under consideration provides, of a just or reasonable regulation or practice in respect to 'transportation.' Obviously the two phrases refer to the same kind of regulations and practices, namely, the regulations and practices under which the transportation of interstate carriers is conducted. When both phrases are considered together and the whole clause is read in the light of the great purposes underlying the act, there is little difficulty in reaching the conclusion that the words 'any regulations or practices whatsoever . . . affecting such rates' are used synonymously with the words 'regulation or practice in respect to such transportation'; and that both clauses are to be read in the widest possible sense and embrace all regulations and the practice of carriers under which they offer their service to the shipping public and conduct their transportation. We find no difficulty in holding, under Section 15 of the amended act, that ample authority is vested in the Commission to deal with undue preferences and unlawful discriminations forbidden under Sections 2 and 3 and elsewhere in the act, regardless of the form of the rule, regulation or practice under which such wrong may be perpetrated."

No serious question of the Commission's power to regulate the distribution of interstate carriers' cars was presented in the Paraffine Works Case, *supra*. It was rather a question as to how far the Commission might go in the use of its authority. In the Paraffine Works decision the Commission said that "hereafter all cars leased

to the carriers by shippers or private car owners will be regarded as cars controlled by the carriers, which must be distributed without discrimination, just as in the case of cars owned by the carriers. This includes all cars secured from shippers for the use of which carriers pay compensation."

A close scrutiny of the decisions of the Supreme Court of the United States dealing with the distribution of cars, while consistently upholding the authority of the Commission to regulate the methods of distribution, discloses the fact that this Court is of the opinion that neither side has the right to insist on an expensive service, the cost of which will ultimately fall upon the consumer. This was the express attitude of the Supreme Court in the Arlington Heights Fruit Exchange Case. That the Commission overstepped its authority, according to the opinion of the special Federal Court in the Paraffine Works Case, when it ordered the carriers to acquire the necessary equipment for certain special commodities or for any commodity for that matter, is the gist of the decision. The court's comment on the attempt of the Commission to find authority in Supreme Court rulings for this extension of its power, is a conclusion that is inevitable from a study of such decisions. (See quotation from decision, *supra.*)

Without again repeating the court's language, suffice it to say that the court's conclusion, under all accepted canons of statute construction, is the inevitable result of an accurate analysis of the decisions of the Supreme Court of the United States and of the letter and spirit of the act itself. The position taken by the court appears to be that the Commission has endeavored to extend its authority beyond the present limits of the regulatory statutes, even though it is conceded that its action has been with good intent.

The law unquestionably confers upon the Commission the power to regulate the use of cars and facilities possessed by carriers subject to the act, but, according to this decision, there is nothing in the law to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses. This is, in effect, the holding of the special Federal Court in the Paraffine Works Case, and until either the Supreme Court of the United States injects into the construction of the Act to Regulate Commerce a greater flexibility than it is now believed to possess, or Congress so amends the act as to admit of the Commission directing the acquisition by carriers of cars and transportation facilities, the Commission must be regarded as exceeding its authority when it attempts to order carriers to acquire equipment and facilities in addition to what they now possess.

Any question as to the reasonableness or discriminatory nature of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Interstate Commerce Commission. Since Congress has also made the duty of a carrier to furnish cars suitable for its traffic a question of rates over which the Commission has exclusive control, there is no question as to the jurisdiction of this administrative body over car distribution when confined to the cars and equipment already possessed by the carrier.

CHAPTER V.

CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1. Effect of Interference of State Statute Penalizing Carrier for Failure to Furnish Cars When Subject to the Jurisdiction of the Interstate Commerce Commission.
§ 2. Acquisition of Equipment by Carriers; Legal Duty.
§ 3. Shippers May Use Private Cars; But Not Required to Furnish Equipment for Their Shipments.
§ 4. Origin of Private Cars.
§ 5. Private Cars of Individual Shippers.
§ 6. Exclusive Use by Owners of Private Cars.
§ 7. Right of Carrier to Refuse to Transport, or to Charge Different Rates for the Movement of Private Cars.
§ 8. Unjust Discrimination in Handling of Private Cars by Carriers When Such Private Cars are Owned by Private Car Companies Prohibited by Law.
(1) Private Cars of Private Car Companies.
§ 9. Foreign Cars.
§ 10. Kinds of Cars.
§ 11. Ventilator Cars.
§ 12. Refrigerator Cars.
§ 13. Special Equipment.

CHAPTER V.

CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1. Effect of Interference of State Statute Penalizing Carrier for Failure to Furnish Cars When Subject to the Jurisdiction of the Interstate Commerce Commission.

A state statute penalizing the failure of a carrier to furnish cars within a specified time, when applied to interstate transportation, is an unconstitutional regulation of interstate commerce.

"Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

H. & T. C. R. R. Co. vs. Mayes, 201 U. S. 321.

In the Minnesota rate case (230 U. S. 352) the extent to which the state authority over transportation affairs may reach was considered by the Supreme Court of the United States. Constitutional conventions and state legislatures have created a great many corporation and public service commissions with powers apparently over intrastate commerce equally broad and in some instances far beyond the powers vested by Congress in the Interstate

Commerce Commission. With these two powers operating on the same or parallel lines, a strict line of demarcation must be drawn between them. The Supreme Court has laid down a comprehensive rule of control between these two regulating authorities, the plain purpose of which is to conserve and promote the interests of interstate commerce within the limits expressed in the federal statutes. "If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce, and its instruments, the measure of regulation it should apply." With this expression by the Supreme Court of the extent of the federal power over interstate commerce, and its instruments, it is clear, as a broad principle of the regulating system, that a state may not inflict a regulation as to the furnishing or distribution of cars which is in any wise in conflict with the paramount constitutional power of Congress which it has already exerted in the federal regulatory statutes.

§ 2. Acquisition of Equipment by Carriers; Legal Duty.

That the Interstate Commerce Commission has not at all times uniformly construed its powers under the act is evident from its different rulings with respect to the acquisition by carriers of cars and transportation facilities. In its earlier rulings the Commission recognized and abided by the deficiency in the act. While the act mandatorily requires the fulfillment of the carrier's common law obligation to furnish equipment and cars to meet the necessities of and properly protect the traffic which it advertises

for and undertakes to transport, the law is silent upon the question of how or by what means the carrier shall acquire such equipment. Until the later decisions of the Commission in the Hillsdale Coal & Coke, Vulcan Coal & Mining Co., and Paraffine Works cases, it accepted the fact that the carrier is left to its own power of purchase or agreement to provide itself with the necessary equipment required by its business. Thus, the carrier might build its cars, or it might buy them, or it might rent them under lease.

Worcester Ex. Car Co. vs. P. R. R. Co., 3 I. C. C. R. 377, 2 I. C. R. 792.
Scofield vs. L. S. and M. S. Ry. Co., 4 I. C. C. Rep. 158, 2 I. C. R. 67, 76.
Consolidated Forwarding Co. vs. S. P. Co. et al., 9 I. C. C. Rep. 182.
Re Charges for Trans. & Refrig. Fruit, 10 I. C. C. Rep. 360.

In the later decisions above mentioned the Commission set out on an enlargement of its authority to compel the carriers subject to its authority to acquire equipment. It sought justification for this expansion of its power in the changed language of Section 1 in the amendment thereof in 1906. Section 1 of the original act prescribed that "the term 'transportation' shall include all instrumentalities of shipment or carriage." Logically, such instrumentalities of shipment included cars, and such was the construction of the language until 1906. The change in 1906 gave rise to the question of the carrier's duty and the correlative question of the Commission's power to compel the acquisition of necessary equipment.

Under the 1906 amendment, however, the Commission contended that the changing of the definition of the term "transportation" gave to it the direct statutory expression conferring upon it the power to require the carrier to fur-

nish cars, which was lacking, as the Commission itself held, in the prior language of the section, and that the measure of duty theretofore resting upon the carrier to furnish cars was changed from a common law duty, with resort to the courts for its violation, to a statutory duty, with redress for its violation by the Commission. It is well to note precisely what the 1906 change was. The amendment of 1906 prescribes that the term "transportation" shall "include cars and other vehicles and all instrumentalities and facilities of shipment or carriage," and defines certain service to be performed in connection therewith. These services amount to the principal changes made by this amendment of the act, and relate to the receipt, delivery, transfer, ventilation, refrigeration, storage and handling of property transported. These are the essential additions brought about through the 1906 amendment, and while the word "cars" was not included in the definition of "transportation" in the original act, no question has ever been raised doubting that the phrase "instrumentalities of shipment or carriage" within the evident meaning of "transportation" in the act included "cars." The language of the court in the Paraffine Works case, supra, is in harmony with these evident facts.

"The definition of the term 'transportation' as it appears in the amendment of 1906, so far as it relates to cars, does nothing more than express what was implied in the original definition, and contains nothing which suggests that in furnishing transportation there shall rest upon the carrier a duty to furnish cars of a kind different from those required of the carrier under the original act.

"We find no case prior to the amendatory act of 1906 which questioned that cars were instrumentalities of shipment or carriage. If such a question existed, then the act of 1906 naming cars as one of the instrumentalities of ship-

ment, might have been a change with a purpose, creating a difference in legal effect.

"In seeking the effect of the amendment of 1906 inquiry may be made with respect to the purpose of Congress in enacting it. It is apparent from the addition of the definition of 'transportation' contained in the amendment that Congress intended, and clearly succeeded in, including within that term certain services over which Congress deemed it advisable that the Interstate Commerce Commission should have power and control. These were ventilation, refrigeration, icing, storage, and handling of property transported. This power was conferred upon the Commission for the avowed purpose, among others, of relieving the shipper of the task and annoyance of dealing with more than one person. These were new matters and therefore were additions to what was meant by transportation as defined in the original act. But the addition of the word 'cars' in the amendment made no addition to the definition in the original act, because cars were already embraced in it.

"We find nothing in the original or amended act which, by express language, imposes upon a carrier the extraordinary duty or confers upon the Interstate Commerce Commission the extraordinary power claimed by the government in this proceeding. If they exist, they can be found only by implication, and it is doubtful if Congress would leave to implication an intention to impose so onerous a duty and to grant so great a power. On the other hand, we find in the act, by clear expression, duties imposed, but are qualified by the ability of the carriers to conform to the duties prescribed.

"The provisions of the act requiring a carrier to maintain and operate switch connections with lateral or branch line railroads, appearing in the last paragraph of the first

section of the act, imposes upon a carrier the duty to 'furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.' The words, 'to the best of its ability,' of course, qualify the duty to maintain switch connections, and do not qualify the prohibited discrimination.

"Again, in section 3 of the act, it is provided that 'every common carrier . . . shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between the respective lines, and for receiving, forwarding and delivering of passengers and property.' Here again the carriers' duty to provide and furnish facilities of transportation is not absolute. The duty is laid upon them 'according to their respective powers.' Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and, if they did not have them, to acquire them whether they had the money or not. Restricting our construction of the act to its words, and finding nothing by implication that changes or qualifies their meaning, we are of opinion that the amendment of 1906, including cars within the definition of 'transportation,' added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the Commission, and vested in the Commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater duty is imposed upon a carrier with respect to furnishing and providing cars than was prescribed by the original act, then the practice of the carrier found unlawful in this case was not in violation of the statute, and the order of the Commission directing the carrier to desist from that practice was an exercise of power not conferred by law.

"The Act to Regulate Commerce does not confer upon the Interstate Commerce Commission all power over cars and other instrumentalities of shipment. Congress has reserved unto itself, and from time to time has exercised, power to control and regulate certain instrumentalities of shipment, notably by the acts establishing the standard height of draw-bars, prescribing safety appliances and regulating the hours of service of the carriers' employes.

"But aside from special enactments of this class, federal legislation regulating commerce, in so far at least as it is contained in the act of 1887 and its amendments, has thus far left carriers free to exercise their own judgment in the purchase, construction, and equipment of their roads and in the selection of their rolling stock. By this legislation federal control has been assumed over the use to which the carriers' roads and equipment are put, to the end that the flow of commerce, in the employment of these instrumentalities, may not be impeded, and that unjust rates shall not be charged and unfair practices pursued to the injury of persons and localities. The law clearly confers upon the Commission power to so regulate the use of the facilities possessed by the carrier that there shall be no unjust discrimination, but we find nothing in the law which confers upon the Commission power to compel the carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preference, but in order that the shipper may have larger, better and perhaps more economical facilities."

While the logic of the court's opinion just cited seems irresistible, and in harmony with the rules of construction applied to utilitarian statutes, it does not foreclose the presumption that the intent of Congress has at all times been that the carrier shall "provide" the instrumentalities of

shipment or carriage, including cars, necessary to enable the carrier to carry out its tariff promise to transport a certain traffic. In other words, conceding as a matter of statutory construction the correctness of the special court's ruling, it still seems that if the carrier so construct its tariff provisions providing for the acceptance and transportation of a certain commodity, it puts itself in a position where it must furnish the necessary cars and facilities, even though it be obliged to acquire the cars or facilities, in the event it did not already possess them. A court of law in construing a statute, as the special court did in the Paraffine Works case, has nothing to do with the merit of the order reviewed, the injustice of the practice found to exist or the wisdom of the practice established in lieu thereof, nor of the effect of the order upon any individual interest, and we may not criticize a strict interpretation of the statute in a case where it is suggested that the Commission sought to exert a power constitutionally beyond the scope of its vested authority. But in viewing the intended effect of the act as a whole, and of its amendatory and supplemental acts, we are constrained to advance the point that if a carrier so establish itself under its lawful tariffs that it offers and binds itself to afford a certain transportation service to the shipping public, it must provide the cars and instrumentalities of shipment or carriage necessary to the proper performance of such transportation service, without unjust discrimination or unreasonable charge, and if it does not already possess such cars and facilities, must acquire them or withdraw from its tariffs a service it is physically incapable of performing.

§ 3. Shippers May Use Private Cars; But Not Required to Furnish Equipment for Their Shipments.

While the right to use private cars may doubtless be denied to shippers by appropriate legislation, in the ab-

sence of a specific enactment to that effect the Commission is not prepared to say that their use in itself is unlawful; but if their use results under a given set of circumstances in an unlawful advantage to their owners and an unlawful disadvantage to other shippers, a question is presented which under existing legislation is within the control of the Commission and may be made the basis of such relief as the facts may justify.

Ruttle et al. vs. P. M. R. Co., 13 I. C. C. R. 179.

Nor may shippers be required to furnish the instrumentalities, in the way of equipment and cars, for the carriage of their traffic, since that duty lies solely upon the carrier who undertakes the transportation of their traffic.

Rice, etc., vs. W. N. Y. & P. R. Co., 4 I. C. C. R. 131, 3 I. C. R. 162.

It may be said, however, in favor of the use of private cars by shippers that the handling of the traffic with the aid of private cars adds to the carrier's equipment and thus indirectly benefits shippers who do not use private cars, because system cars which would otherwise go to the owners and users of the private cars are put at the service of the independent shippers.

The precise point of importance, of course, is that not only has the shipper the right to use a private car until either the Commission or some competent court rules otherwise, but that the ownership of the car by the shipper does not constitute that shipper a common carrier within the meaning of the Act to Regulate Commerce. (See Section 5 of this Chapter.)

§ 4. Private Cars; Origin of.

The private car has been evolved as a necessity in certain highly specialized lines of industry, such as live stock,

poultry, eggs, dairy products, packing house products, dressed beef, and fruits and vegetables, requiring heat, refrigeration, or ventilation, in transit.

Private cars have greatly increased in number in late years, and at present are divisible into two classes: (1) those owned and operated by individual shippers, and (2) those owned and operated by private car companies under special arrangements with the carriers.

In the former class the property of the owner is generally shipped in the car; whereas, the owner of the private car company usually has no interest whatever in the property transported in its cars, but simply leases the equipment to the carrier.

> See Annual Reports of the Interstate Commerce Commission for years 1903 to 1906; and Conference Rulings Bull. No. 6, Rulings Nos. 79-b, 122, and 128.

§ 5. Private Cars of Individual Shippers.

The law does not forbid a carrier from obtaining cars from a shipper for the transportation of such shipper's freight over its line, but in every such transaction the carrier, at its peril, must see to it that a shipper furnishing his own cars, receives no other or different rates than other shippers who use the cars of the carrier for a similar purpose.

> Scofield et al. vs. L. S. & M. S. R. Co., 2 I. C. C. R. 90, 2 I. C. R. 67.

Nor is a carrier prohibited by the act from leasing cars from a shipper.

> Worcester Excursion Car Co. vs. P. R. R. Co., 3 I. C. C. R. 577, 2 I. C. R. 792.

A carrier may lawfully refuse to haul a private car for shipper which is in an unsafe or unsuitable condition.

Mich. Congress Water Co. vs. C. & G. T. R. Co., 2 I. C. C. R. 594, 2 I. C. R. 428.

Because a carrier contracts with one shipper for the use of its private cars, it is not under compulsion to contract with other shippers for the use of their private cars.

Consld. Forwdg. Co. vs. S. P. Co. et al., 9 I. C. C. R. 182.

No superior right to use the facilities of the carrier in transportation accrues to the owner of a private car from the mere fact of ownership of the car. The owner of a private car has no right to have his car attached to a locomotive in preference to a system car loaded by another shipper.

The ownership of a private coal car, or the possession of a foreign railway fuel car, give to an operator no preferred right to have such car occupy a carrier's sidings or other tracks to the exclusion of a system car loaded by another coal operator, or to have it handled by a train crew in preference to a system car.

The Commission holds that "when any of these general facilities are insufficient to move all the traffic offered, no operator has a superior right over another merely because he enjoys the advantage of owning private cars or has fuel contracts with connecting lines."

Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. R. 86, 92.

The question of the extent to which the jurisdiction of the Interstate Commerce Commission extends over the private car is not a settled one, so far as the courts are concerned. The definition of "transportation" in Section 1 of the Act to Regulate Commerce includes such instrumentalities of shipment or carriage as the private car when let to the railroad, but the definition is a preliminary to a

requirement that the carriers shall furnish them upon reasonable request, and not that the builders or owners of the private cars shall be regarded as carriers. The extent of the Commission's control over private cars is not greater than its control over the railroads subject to the act, and so far as the possession of the private car by the owner or builder is concerned the regulating authority does reach it.

Ellis vs. I. C. C., 237 U. S. 434.

§ 6. Exclusive Use by Owners of Private Cars.

While the right to use private cars may doubtless be denied to shippers by appropriate legislation, in the absence of a specific contract of hire to the carrier stipulating for the exclusive use of the car, it must be upon such terms as shall not constitute an unjust discrimination against shippers of like traffic in cars owned by the carrier and who are excluded from the use of the car so hired.

Indpt. Refrs. Assn. vs. W. N. Y. & P. R. Co., 4 I. C. R. 162.

§ 7. Right of Carrier to Refuse to Transport, or to Charge Different Rates for the Movement of Private Cars.

A carrier may lawfully decline to haul private cars at all, or it may haul private cars of one class and refuse to haul others of a wholly different class.

In determining whether it will in any case transport private cars of a certain class, the carrier may properly take into account the effect of the practice upon the interests and localities it serves; but the right of a shipper to have his car hauled does not depend upon the wishes of his business rivals.

Carr vs. N. P. R. Co., 9 I. C. C. R. 1.
Chappelle vs. L. & N. R. Co. et al., 19 I. C. C. R. 56.

Where the difference in cost or character of service is substantial, either in the work performed by the carrier or

in its utility and value to the person served, a carrier may lawfully charge a higher rate to haul one class of private cars than it charges for a different class; a fair relation of rates meeting the carrier's obligations.

Carr vs. N. P. R. Co., 9 I. C. C. R. 1.
Chappelle vs. L. & N. R. Co. et al., 19 I. C. C. R. 56.

§ 8. Unjust Discrimination in Handling of Private Cars by Carriers When Such Private Cars Are Owned by Private Car Companies Prohibited by Law.

If a carrier transport private cars of any class, it must in like manner and upon like terms transport all private cars occupied for the same or similar purposes.

Carr vs. N. P. R. Co., 9 I. C. C. R. 1.
Chappelle vs. L. & N. R. Co., 19 I. C. C. R. 56.
See also, "Discriminations and Preferences."

(1) Private Cars of Private Car Companies. A railroad company may undoubtedly enter into a contract with another road or a car-line company to supply it exclusively with refrigerator cars for the transportation of perishable commodities over its lines.

Re Transportation, etc., of Fruit, 10 I. C. C. R. 360.

The Commission has held that where a railroad company has by an arrangement with one car company procured a sufficient supply of sleeping and excursion cars for all the business of its lines, and refuses to haul excursion cars of other private car companies over its track for this reason, it cannot be forced to do so against its objection; that unless the contrary is imposed as conditions in the grant of its charter, the right to construct and operate a railroad is a franchise in its nature exclusive, not held in common with the public, though the grant of the franchise is for the public use; and the tracks of a railroad are not a common

highway upon which anyone can enter and use his own cars for transportation purposes against the objection of the company owning the tracks; that it would be directly at war with the rights and safety of the traveling public, as well as of the railroad company, if the line of the carrier should become an arena over which it should be compelled to make a contract of some sort with every car company or inventor of cars, and transport the public in trains of which such cars were a part.

Worcester Excursion Car Co. vs. P. R. R. Co., 3 I. C. C. R. 577, 1, I. C. R. 811, 2 I. C. Rep. 12, 792.

And that the refusal of a carrier to transport stock in cars offered at the same rates charged for stock in cars of a car-line company under contract with the carrier to furnish it with stock cars was not an unjust discrimination in favor of the transportation company, whose cars the carrier was using, within the meaning of the Interstate Commerce Act, as the circumstances and conditions were not substantially similar.

U. S. vs. D. L. & W. R. Co., 40 Fed. Rep. 101.

Railroad companies are not required by usage, or by the common law, to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled, nor to do more as express accommodations; and they need not in the absence of a statute furnish to all independent express companies equal facilities for doing an express business upon their passenger trains.

Express Cases, 117 U. S. 1, 29 L. Ed. 791.

In the Ellis case, supra, the Supreme Court said of the Armour Car Lines:

"The Armour Car Lines is a New Jersey corporation that owns, manufactures and maintains refrigerators, tank

and box cars, and that lets these cars to the railroads or to shippers. It furnishes cars for the shipment of perishable fruits, etc., and keeps them iced, the railroad paying for the same. It has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation in Section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads, but the definition is a preliminary to a requirement that the carrier shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private cars, etc., is to be effected by its control over the railroads that are subject to the act. The railroads may be made answerable for what they hire from Armour Car Lines, if they could not be otherwise, but that does not affect the nature of the Armour Car Lines itself."

§ 9. Foreign Cars.

The shipper is interested in the "foreign cars," which are cars off the line of the owning carrier, from three standpoints—i. e., (1) the responsibility of the carriers therefor, (2) their distribution in times of car-shortage, and (3) duty of carriers to provide compensation therefor. They are a factor in an adequate car supply, to which question the Commission gave cognizance in the Vulcan Coal & Mining Company case (33 I. C. C. Rep. 52, 64), where it held that it is the carrier's duty to maintain a reasonably adequate car supply, and the question of what is a reasonably adequate car supply is just as much an administrative one as the question of what is a reasonable rate.

In all truth, a "foreign" car does not establish any new relationship between the shipper and the carrier. The mere fact that the carrier transporting the shipment does not, in fact, own the car in which it is transported does not affect the status of the contract of transportation. In respect to its use in the service of the transporting carrier, it stands as a part of that carrier's equipment devoted to transportation. The foreign car does, however, offer opportunity for discrimination in the distribution of cars to shippers, for it is properly recognizable that the ownership of a car carries with it the right of the owning carrier to place proper restrictions upon its use and to regulate its return to its own line. However, even this right to make proper rules for the return of empty cars to the line of the owning-carrier may not be exercised, under the guise of enforcing transportation rules, to impose burdens or discriminations upon shippers.

Pine Belt Lumber Co. vs. G. & S. I. R. R. Co., 33 I. C. C. Rep. 117, 118.
Doran & Co. vs. N. C. & St. L. Ry. Co., 33 I. C. C. Rep. 523, 530.

When a carrier accepts and uses for transportation cars owned by shippers or other carriers, in legal contemplation it adopts them as its own for purposes of rates and carriage, and neither the manner of acquiring cars, nor the inability to furnish its general patrons the use of cars similar to those furnished by some shippers for their own traffic can excuse or justify a carrier for discrimination in rates that may give one shipper advantages over another; nor can any device such as the payment of unreasonable rent for the use of cars furnished by shippers or other carriers be practiced to evade the duty of equal charges for equal service.

Rice, etc., vs. W. N. Y. & P. R. Co., 4 I. C. C. Rep. 131, 3 I. C. R. 162.

Primarily the line of the railroad is constructed for the transportation of its own cars, but if the diversities and peculiarities of the traffic are such that it is not always practicable for the carrier to supply all of its rolling stock from cars owned by it and it is necessary to obtain some portion of it from others, then the carrier at its peril must see to it that the rates charged are no higher on cars owned by it than they are on the cars it has obtained from others. This is true both as to passenger and freight service.

Worcester Express Car Co. vs. P. R. R. Co., 3 I. C. C. Rep. 577, 1, I. C. R. 811, 2 I. C. Rep. 12, 792.

The law does not forbid a carrier from obtaining cars for the transportation of freight over its line from other carriers or shippers, but in every instance the rates of freight must be exactly the same as they would be if such cars were owned by the carrier so using them; and in every such transaction the carrier at its peril must see to it that a shipper, furnishing his own cars, receives no other or different rate than other shippers who use the cars of the carriers for a similar service.

Scofield et al. vs. L. S. & M. S. R. R. Co., 2 I. C. C. Rep. 90, 2 I. C. R. 67.

Where a carrier pays mileage for a car which it employs in the service of shippers, it is the carrier, and not the party or company from whom the car is rented, who furnishes the car to the shipper, and in such case there is no privity of contract between the car owner and the shipper.

Truck Farmers' Assn., etc., vs. N. E. R. R. Co. et al., 6 I. C. C. Rep. 295.

The Act to Regulate Commerce, as now amended, contemplates no departure from this principle, since "trans-

portation" is made to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of contract, express or implied, for the use thereof."

Act to Reg. Com. (Amd. 1910), Sect. 1.

During the performance of the transportation the car is to every practical intent and purpose the car of the railroad company using it, and its measure of responsibility as to the sufficiency of the car is the same, whether it obtains the car by purchase or lease.

Re Charges for Transportation and Refrigeration of Fruit, etc., 11 I. C. C. Rep. 129.

§ 10. Kinds of Cars.

Under the terms of Section 1 of the Act to Regulate Commerce, defining "transportation" to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported," and requiring every carrier subject to the act to "provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto," the carrier is bound to furnish the "transportation" described, and in furnishing such transportation it must afford the shipper

of any particular or hazardous kind of traffic the cars and facilities which will protect and preserve such traffic while in transit and until its lawful delivery of such traffic to the consignee is consummated.

Act to Reg. Com. (Amd. 1910), Sect. 1.

Justifiable confusion exists in the minds of many shippers as to the legal duty of common carriers to furnish different kinds of cars and facilities necessary for the proper handling and transportation of according to the particular nature of the traffic. The common law does not require of the common carrier that it accept every kind of goods, nor any kind, under all circumstances. It affords the carrier the right, by public notice, to relieve itself from the obligation to carry particular kinds of goods. Thus, cases are abundant which hold that the carrier may refuse to accept for transportation goods improperly packed, or of a dangerous nature, or when contents are not disclosed and the visible effects are suspicious. Again, the law has recognized the right of the carrier to establish an embargo on certain traffic when the press of business is such the carrier is justified in refusing it or conditions over which the carrier has no control prevent it properly transporting the traffic. And this is the law, irrespective of the requirements of the Act to Regulate Commerce. A careful reading of the act does not disclose any requirement in the furnishing of cars and facilities superior to the dictate of the common law. The act, in this respect, is directed, rather, to the manner or method by which the cars and facilities are furnished.

It is likewise the common-law rule that whatever kinds of traffic the common carrier holds itself out to the public to transport, it must furnish therefor the necessary cars and facilities to insure safe and proper transportation. Thus,

the courts have held that the common carrier must furnish refrigerator cars for the transportation of perishable traffic requiring refrigeration in transit. The rule, however, has not been, nor should it be, extended to meet the whim of the shipper or to require the carrier to equip itself with a special type of car for a special movement of traffic when such special cars would remain idle for long periods. The requirement has been tempered with reasonableness on both sides.

The effect of the exercise of the administrative powers of the Commission over rates and service of the carriers from the standpoint of reasonableness of charge and equality of service has had much to do with establishing a stricter application of the common-law under the Act to Regulate Commerce.

Several recent decisions by the Interstate Commerce Commission lend strength to the Commission's assumption of an authority over the furnishing of cars that is not clearly established by the language of the Act to Regulate Commerce. As defined by the special court in the Paraffine Works case the regulating act does not provide that the carrier is required to "acquire" special cars in the shape of tank cars in order to meet the requirements of the act, but that the plain purpose and intent of the statute was to vest in the Commission a control of the use of the equipment already possessed by the carrier. It should not be understood that this interpretation of the act relieves the carrier from carrying out the promises and undertakings of its tariffs lawfully on file with the Commission. In other words, if the carrier holds itself out to transport a special kind of freight, requiring special equipment and facilities, it must so far as its ability permits furnish the cars and vehicles and all instrumentalities of shipment or carriage for such traffic.

Under the amended act common carriers subject thereto may not lawfully refuse "transportation" as therein defined, and must upon reasonable request afford the same upon established rates filed and kept posted as required by law.

And even prior to the amendment of the Act to Regulate Commerce the Commission and the Supreme Court of the United States upheld the common-law requirement enacted into the statute that where a railroad company held itself out as a common carrier of perishable freight it was the duty of such carrier to furnish proper cars and facilities to insure its safe and lawful delivery at destination.

Nor are the jurisdiction and authority of the Commission, and the plain purpose of the law, defeated by the omission or failure of the carriers to include in their schedules and tariffs, posted and open to public inspection, the rates, fares and charges for the entire service of transportation, both ordinary and special, provided the request therefor is reasonable.

Waxelbaum & Co. vs. A. C. L. R. R. Co., 12 I. C. C. R. 178, 183.

If we accept the ruling of the court in the Paraffine Works case, in connection with its review of decisions of the Supreme Court of the United States concerning the furnishing of equipment by carriers, as decisive of the legal interpretation of the act in this respect, then the carrier is under no statutory duty to provide "transportation" of a type it does not possess, in order to meet the requirement that it furnish such transportation upon reasonable request. Further analyzed, since transportation is inclusive of cars, it would mean that the carrier is not required to provide itself with cars of a type it does not possess in

order to transport, upon reasonable request, any special kind of traffic. Since there are no cases precisely touching this point among the decisions of the Supreme Court, it cannot be said that the supreme judicial authority of the land is in affirmation of so strict an interpretation of the act or of the common law.

The more general construction of the regulating laws that the carriers must furnish "transportation" which is reasonably adequate to keep pace with the normal demands of commerce is favored as the true intent of Congress.

This is the view of the Interstate Commerce Commission and is the principle underlying its test as to the reasonableness of the shipper's request for special equipment or cars. A shipper's request for cars especially suited for the transportation of his products would not be reasonable if the cars must be prepared for shipment in a manner which is peculiarly within the technical knowledge of men connected with that industry, or if the movement of the commodity is a dangerous operation which can be safely performed only by men engaged in its production.

The factor of economy from the standpoint of the shipper, the consumer, and the carrier ought properly to be considered in any requirement compelling the carrier to furnish special equipment.

The holding of the Supreme Court of the United States in the Santa Fe Ry. Company case, 232 U. S. 199, following the decision of the Commission in Arlington Heights Fruit Exchange vs. S. P. Co., 20 I. C. C. Rep. 106, is important in this connection. In this case the court held that the carrier has a right to furnish whatever transportation service or facility the law requires a carrier to supply, the point being that the carrier is not required to accept any service or facility from the shipper or non-carrier owner thereof

which is properly a part of the required transportation service, but may insist upon the use of its own service and facilities provided the same are adequate and reasonable.

The question, therefore, of the duty of the carrier to furnish all kinds of cars required by both ordinary and special traffic is competently answered to the effect that if the carrier holds itself out as a carrier of special species of freight, it is its duty to furnish proper cars to carry such traffic, and this duty it may not shift to the shipper. The carrier still occupies its position under the common law that it may control, to the extent that it meets the reasonable demands of commerce, the kinds of traffic it will undertake to carry, but having established in its tariffs an unrestricted acceptance of special species of freight, it must furnish such service and facilities therefor as will lawfully discharge the undertakings in its tariffs. And this burden falls upon the initial carrier.

S. W. Mo. Millers Club vs. St. L. & S. F. R. R. Co., 26 I. C. C. Rep. 245, 253.
Coal Rates on Sandy Fork Branch, 26 I. C. C. Rep. 168, 174.

§ 11. Ventilator Cars.

The Act to Regulate Commerce, as now amended, in terms requires the carrier subject thereto to furnish "ventilation" as part of its transportation service, and, therefore, it follows that it is the carrier's duty to furnish ventilator cars to the shipper of traffic requiring preservation and protection in transit by ventilation.

Act to Reg. Com. (Amd. 1910), Sect. 1.

This section of the act provides that the furnishing of the car is a part of the transportation, and for such traffic as the carrier undertakes to carry which requires ventila-

tion in transit, such as oranges and citrus fruits, it can not refuse to furnish proper equipment upon fair terms.

Arlington Heights Fruit Exchange vs. S. P. Co., 20 I. C. C. Rep. 106, 117, 118.
A. T. & S. F. Ry. Co. vs. I. C. C., 232 U. S. 199.
John Nix & Co. et al., vs. So. Ry. Co. et al., 31 I. C. C. Rep. 145.
Pacific Fruit Exchange vs. S. P. Co. et al., 31 I. C. C. Rep. 159.
Rates on Tomatoes, etc., 33 I. C. C. Rep. 145.
R. R. Com. of Calif. vs. A. G. S. R. R. Co. et al., 32 I. C. C. Rep. 17.
Protection of Potato Shipments in Winter, 29 I. C. C. Rep. 504.
Rates on Tomatoes, etc., 29 I. C. C. Rep. 522, 523.
See "Interstate Commerce Law," Chap. VI, Sect. 92.

§ 12. Refrigerator Cars.

The Act to Regulate Commerce as presently amended specifically requires all carriers subject thereto to furnish "refrigeration" as part of their transportation service upon reasonable request therefor, and, hence, it is legally incumbent upon such carriers to furnish refrigerator cars to shippers of freight requiring refrigeration in transit.

Act to Reg. Com. (Amd. 1910), Sect. 1.

As previously stated, this obligation rests upon the carrier under the common law, irrespective of the requirements of the Act to Regulate Commerce. The carrier has been held liable, by the federal and Supreme courts, where it had facilities for furnishing shippers of vegetables refrigerator cars to transport them, which cars the carrier did not own, but the shipper in reliance thereon had raised vegetables which required refrigerator cars for transportation to the market, because of its failure to furnish such cars for the transportation of the shipper's vegetables on reasonable demand.

Covington Stock Yards Co. vs. Keith, 139 U. S. 128.
A. C. L. vs. Garaty, 166 Fed. Rep. 10.

The rulings of the Interstate Commerce Commission are uniformly to the effect that the carriers subject to the act must furnish refrigerator cars to shippers of traffic requiring refrigeration in transit, and that the carrier furnishing such refrigerator cars is entitled to reasonable compensation for the refrigeration service.

See in this connection "Interstate Commerce Law," Chap. VI, Sect. 92. See also Judson on Interstate Commerce, 2nd Ed., Sect. 154.

Cost of construction, average life, maintenance, weight, etc., of refrigerator cars are factors of additional expense in the service of the carrier to which it is entitled to consideration in fixing a reasonable compensation for refrigeration service. A refrigerator car costs fifty per cent. more, on the average, to construct than a box car, and the cost of maintenance to the carrier of the refrigerator car is one-third greater than that of an ordinary box car. The average life of a box car is five years longer than that of a refrigerator car. The weight of a refrigerator car, which, of course, enters into the haulage cost of the carrier, is greatly in excess of the weight of a box car, while the cubical contents of the refrigerator car is materially less than that of the same outside dimensioned box car. More than this, the refrigerator car is used only during certain portions of the year and for a certain traffic, in many instances.

Refrigerator cars are known also as "insulated cars" because of their construction to keep out heat and retain cold.

Rules Governing Transp. of Potatoes, 34 I. C. C. Rep. 255.
Best Co. vs. G. N. Ry. Co., 33 I. C. C. Rep. 1, 2.

R. R. Com. of Calif., etc., vs. A. G. S. R. R. Co., 32 I. C. C. Rep. 17, 25.
Nix & Co. vs. S. Ry. Co., 31 I. C. C. Rep. 145, 149.
Rental Charges for Insulated Cars, 31 I. C. C. Rep. 255, 256, 257.
Refrigeration Charge, etc., 26 I. C. C. Rep. 617, 620.
Protection of Potato Shipments, 26 I. C. C. Rep. 681, 684.
Advances on Potatoes, 25 I. C. C. Rep. 159, 163.
Albree vs. B. & M. R. R. Co., 22 I. C. C. Rep. 303, 322.
Arlington Heights Fruit Exchng. vs. S. P. Co., 20 I. C. C. Rep. 106.
Swift & Co. vs. C. & A. R. R. Co., 16 I. C. C. Rep. 426, 430.

§ 13. Special Equipment.

The duty of the carrier subject to the Act to Regulate Commerce to furnish special equipment for special species of freight is literally confined to the "cars and vehicles and instrumentalities of shipment or carriage," and "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and handling of property transported." This language may be so broadly read as to impose upon the carrier the necessity of furnishing specially constructed cars for each special species of traffic which might be offered for transportation. Thus, a special kind of car might be required for a single shipment, and such car remain idle for long periods, because of its inadaptability to other kinds of traffic. The Commission, however, has viewed this provision of the act in a liberal attitude both toward the carrier and the shipper. Its most drastic action, under this section, was taken in the Vulcan Coal & Mining Co. and Paraffine Works case, supra, where it directed the carriers to acquire and furnish a certain form of special equipment for which there was a justifiable amount of traffic. But the special court in the Paraffine Works case, supra, denied the Commission's power to go this far.

The most tenable rule for the application of this requirement in the act is that where special freight moves regularly and in sufficient volume to justify it, the carrier must furnish such special equipment therefor as its ability permits.

It is interesting to note that in a very early case the Commission (1 I. C. C. Rep. 503, 1 I. C. R. 722) declared that it was properly the business of the carrier to supply the rolling stock for the traffic it offers and purposes to carry, and that if the diversity and peculiarities of the traffic are such that this is not practical, the consignors must supply it themselves, and that the carrier must not allow his own deficiencies in this particular to be the means of competing to the disadvantage of those who make use of the traffic and the facilities it supplies. (An interesting discussion of special and private cars will be found in the Commission's Annual Report for 1904, prior to the 1906 amendment of the act bringing such cars within the jurisdiction of the Commission.)

In the last case in which the Commission gave consideration to the duty of carriers to furnish special equipment, it did not hesitate to declare that it possessed power to require carriers subject to the act to furnish all necessary equipment, both ordinary and special, upon reasonable request. It then proceeded to define "reasonable request" not to admit of a shipper demanding cars especially fitted for the transportation of his products if such cars must be prepared for shipment in a manner peculiarly within the knowledge of men connected with that particular industry, or if the movement of the commodity was a dangerous operation and only capable of being safely performed by men engaged in its production.

Grain Elevation Allowances at Kansas City, 34 I. C. C. Rep. 442, 446, 447.

Vulcan Coal & Mining Company vs. I. C. R. R. Co., 33 I. C. C. Rep. 52.
Rates on Gasoline Engines and Windmills, 29 I. C. C. Rep. 643.
Ochsenreiter vs. A. T. & S. F. Ry. Co., 33 I. C. C. Rep. 518, 520.
Kenner Truck Farmers' Assn. vs. I. C. R. R. Co., 32 I. C. C. Rep. 1.
Northbound Traffic from Texas Points, 32 I. C. C. Rep. 203, 204.
Cement Rates from Points in Illinois, 32 I. C. C. Rep. 369, 371.
Rates on Live Poultry in Western Trunk Line Territory, 32 I. C. C. Rep. 380, 383.
Rates on Beer and other Malt Products, 31 I. C. C. Rep. 544, 545.
Protection of Potato Shipments in Winter, 29 I. C. C. Rep. 504, 506.
C. & N. W. Ry. Reconsignment Rules, 29 I. C. C. Rep. 620, 624.
Act to Reg. Com. (Amd. 1910), Sect. 1.
Western Classification Case, 25 I. C. C. Rep. 442, 443.

An analysis of the decisions of the Supreme Court of the United States discloses it uniformly ruling that a railroad company, holding itself out as a carrier, is under a legal obligation arising out of the fact of its employment, to provide transportation means and facilities commensurate with the demands of shippers, but these expressions of the Supreme Court are not carried to the point of requiring the carrier to acquire equipment beyond its means.

Covington Stockyards Co. vs. Keith, 139 U. S. 128, 133.
Atchison Ry. Co. vs. U. S., 232 U. S. 199.
C. R. I. & P. Ry. Co. vs. Hardwick Farmers' Elev. Co., 226 U. S. 426.
M. K. & T. Ry. Co. vs. Harris, 234 U. S. 412, 418.
Y. & M. V. R. R. Co. vs. Greenwood Grocery Co., 227 U. S. 1.
St. L. I. M. & S. R. R. Co. vs. Edwards, 227 U. S. 265.
Hampton vs. St. L. I. M. & S. Ry. Co., 227 U. S. 456.
Penn. Refg. Co. vs. W. N. Y. & P. R. R. Co., 208 U. S. 208.

T. & P. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.
B. & O. R. R. Co. vs. U. S., ex rel. Pitcairn Coal Co., 215 U. S. 481.

In Flour City S. S. Co. vs. L. V. R. R. Co., 24 I. C. C. Rep. 179, 185, the Commission declared that the provisions of Section 3 of the act broadens Section 1 and makes plain the intent of Congress that every reasonable and proper facility shall be extended equally by a carrier to all its connections.

CHAPTER VI.

CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1. Condition of Equipment Furnished by Carrier.
§ 2. Car Fittings.
§ 3. Car Furnishing.
§ 4. Car Size.
§ 5. Cars Off Line.

CHAPTER VI.

CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1. Condition of Equipment Furnished by Carrier.

It is the well-established duty of every common carrier by rail to furnish to the shipper its cars in proper condition to meet the service requirements of the shipper's freight. A proper condition of the equipment is one that does not put the shipper to expense in preparing it for use. The shipper of ordinary traffic should not be required to repair or clean the equipment furnished him by the carrier.

However, the jurisdiction of the Commission is not controlling over the condition of cars, except in so far as the matter of condition operates to produce unreasonable charges or unduly discriminatory service. The law of negligence puts upon the shipper a duty to act in prudence in the use of the carrier's car. Where the condition of the car is defective, and reasonably within the knowledge of the shipper, he would be held to contribute to the negligence of the carrier if he proceeds knowingly to place his freight in such defective car and damage to the goods results therefrom.

It is the carrier's duty to furnish equipment, which necessarily includes the obligation to furnish equipment in good repair and suitable condition for the transportation which it holds itself out to perform.

Farmers' Co-op. Assn. vs. C. B. & Q. R. R. Co., 34 I. C. C. Rep. 60, 62.
Grain Elevation Allowances at Kansas City, 34 I. C. C. Rep. 442, 446, 447.
Wabash Sand & Gravel Co. vs. Vandalia R. R. Co. et al., 31 I. C. C. Rep. 344, 346.
Sloss-Sheffield Steel & Iron Co. vs. L. & N. R. R. Co., 30 I. C. C. Rep. 597, 602.
S. W. Mo. Millers Club vs. St. L. & S. F. R. R. Co., 26 I. C. C. Rep. 245, 250.
Balfour, Guthrie & Co. vs. O.-W. R. R. & N. Co., 21 I. C. C. Rep. 539.

Since it is the duty of the carriers to furnish cars suitable for transportation, proper methods should be employed by the carriers to the end that the condition of equipment is known by them, and, because of the constant use of cars and the resulting strain upon them, cars should be carefully inspected by the carriers with a view of locating leakages, removing splinters and nails, and other interior breakings, and foreign substances in cars which might contaminate products in the load.

The Commission has commended the practice on the part of certain carriers of requiring agents and car inspectors after examining a car to attach a card or placard to it announcing or denoting the fact that it has been inspected and placed in condition for loading. This especially with reference to cars used for the transportation of flour or grain.

S. W. Mo. Millers Club vs. St. L. & S. F. R. R. Co., 26 I. C. C. Rep. 245, 250.
Balfour, Guthrie & Co. vs. O.-W. R. R. & N. Co., 21 I. C. C. Rep. 539.
Hezel Milling Co. vs. St. L., etc., R. Co. et al., 5 I. C. C. Rep. 57, 3 I. C. R. 701.
Michigan Congress Water Co. vs. C. & G. T. R. R. Co., 2 I. C. C. Rep. 594, 2 I. C. R. 428.

§ 2. Car Fittings.

It is obvious that the duty laid upon the carriers subject to the act to furnish cars in suitable condition for transportation necessitates that such "suitable condition" shall mean the receiving and transporting of goods tendered them for carriage in safe shipping condition. It is not, however, an obligation of the carrier to prepare shipments for transportation. The service of loading, furnishing material, and placing in the cars is an additional service over and above the transportation service, and for which carriers are entitled to receive reasonable compensation.

The Commission has held that standard box, stock, ventilated, and refrigerator cars in good repair will accommodate all of the ordinary and usual needs of shippers, and if more than this is demanded because of the form, nature, or peculiar characteristics of goods tendered for transportation some obligation must attach to the shipper in connection with the additional demand.

It has long been the custom, and recognized as the easiest, most economical, and satisfactory way of doing, for shippers to load and unload carload freight, and tariffs and classifications usually provide that carload freight shall be loaded by shipper and unloaded by consignee. It is obvious, from every standpoint, that the average shipper can load freight more satisfactorily and economically than the carrier. Likewise, the consignees are best fitted to unload freight. The law recognizes still another obligation on the part of the shipper and that is where he loads the car to secure the load for safe carriage. Here again the shipper is best fitted to fasten the load upon the car. He has the facilities and men at hand and can do the work more satisfactorily and economically than any one else.

The Interstate Commerce Commission holds that the carrier is legally entitled to make a reasonable charge for

all special services performed by it apart from the service of conveyance.

The important question in connection with car fittings used for the safety and protection of load is whether the shipper shall pay both the cost of the fittings and the cost of transporting the fittings. The language of the Commission in the Dunnage Allowances case is instructive on this point:

"We have in several instances approved of tariff provisions for additional reasonable charges for loading and unloading when done by the carrier. For such services and all other special services performed by it apart from conveyance, we think the carrier may properly make a reasonable charge, since in our view they are not accessorial parts of the transportation which Section 1 requires the carrier to furnish. If the placing of blocks, braces, supports, and like materials in lieu of packing, carting, or boxing of individual units of carload shipments is essential for the safe transportation of the loads, the materials should be furnished and placed by the shipper. Can it be said, however, that having supplied and installed the requisite dunnage, the shipper may lawfully and should equitably be charged, either in part or in full, for the conveyance thereof at the rate charged for the commodity shipped? There can be no doubt on this record that the primary and most important purpose of the dunnage used in varying forms by the shipping interests here represented is to make the load safe for transportation and to obviate injury to the goods, the prevention of damage to the carrier's equipment or property being a minor consideration. Under these circumstances and in view of the fact that the substitution of dunnage for the more expensive boxes and crates and other packing material in respect of most of the commodities discussed is of advantage to the shipper and

reduces the gross weight upon which freight charges must be paid, we think it not inconsistent that the carriers should receive revenue for the total weight hauled. Necessarily, the effect of the cancellation of the allowance will be felt by many other shippers and branches of industry than those represented by protestants, but these, as dealt with of record, suggest no cogent reason for a view contrary to that expressed. In various ways carriers throughout the country in their tariffs provide for transportation free or with appropriate allowance, of ice and stoves and linings with perishable freight; hay, straw, and sawdust with beer, eggs, vegetables, and fruit; salt with salt meats; and feed and attendants with live stock, poultry, and other like articles. These, however, which are mainly in the nature of measures looking to the preservation of the freight, are the outgrowth of peculiar conditions and are not to be identified with the issue now before us. We have uniformly approved of open-car allowances for standards, stakes, strips, blocks, and braces, and in several cases have held 500 pounds to be a reasonable allowance."

Dunnage Allowances, 30 I. C. C. Rep. 538, 543.

Again:

"It is pointed out that materials embraced in dunnage cost money to the shipper and that they are generally lost or wasted with a single use, and therefore have no salvage value. It is also argued that these materials perform a service for the carrier in that they make shipments more secure and to that extent reduce damage claims. It is also suggested that a discontinuance of the dunnage allowance will inevitably have a tendency on the part of the shippers to reduce the weight of the materials thus used, and consequently lessen the security of the shipments. We think there is much force in all these arguments. It is unques-

tionably true that many of the expenses for dunnage are due to the inability of the carrier to furnish the kind of car desired by the shipper, and, rather than wait longer for the car he wants, he accepts the less desirable car, which he can get, and goes to the expense of fitting it. In this manner the shipper really contributes a part of the equipment which it is the duty of the carrier to furnish.

"As an argument against the allowance for dunnage it is pointed out that shippers of other freight must pay freight on the weight of materials used in crating or boxing and in this manner they are being unjustly discriminated against. There is some force in this argument, but it seems to us that it is completely overshadowed by the other considerations which have been suggested. As a matter of sound public policy, as well as in the interests, in the long run, of both shipper and carrier, we think that the allowance of 500 pounds should be continued."

> In the Matter of the Suspension of Western Classification No. 51, 25 I. C. C. Rep. 442, 494.

These views of the Commission are still in full force and effect with respect to open cars, but they were not intended to define a reasonable practice to govern in the use of box cars. Unquestionably boxes, crates, and similar packing materials constitute integral parts of the shipments they inclose and are often taken possession of by the consignee in such condition that they may again be used for the same purpose. Thus, these containers have a further market value, while dunnage materials in both open and closed cars are usually discarded or lost, and thus wasted with a single use. In the Dunnage Allowances case the Commission stated that it was not convinced that the discontinuance of the allowance on traffic in closed cars would tend to lessen the amount of weight of the materials used

for that purpose, and therefore to lessen the security of the shipment. The Commission held that if shippers elect to dispense with the use of boxes, crates, and other packing which might be available for further use and upon the full weight of which the carriers would receive freight charges, the carrier offering equipment which would otherwise adequately take care of the shipment is entitled to revenue for the gross weight transported.

If many of the expenses for dunnage are due to the inability of the carrier to furnish the kind of car desired by the shipper, and, rather than wait longer for the car he wants, he accepts the less desirable car, which he can get, and goes to the expense of fitting it, it follows, states the Commission, that when the more desirable car, i. e., box, stock, or other closed car, is furnished no expense of fitting needs to be incurred except in consequence of conditions for which the carrier is not answerable, and it is optional with the shippers to order and make use of the type of car best adapted to their needs.

It is, of course, commonly known that the general run of articles shipped on open cars, and subject to allowances for stakes, braces, supports, etc., such as lumber, poles, pipe, and similar freight, would not remain on the cars and could not be safely hauled unless so secured, but that, on the other hand, little, if any, dunnage is required for such freight in box cars.

In cases where dunnage is used to enable heavy loading, or for the purpose of securing maximum loads, and consequently the use of fewer of the carrier's cars, the advantages are mutual, and weigh as heavily in favor of the carrier as of the shipper.

In its final analysis the question resolves itself into two considerations—(1) that the use of the dunnage reverts all advantages to the shipper and he should, therefore, pay

not only for the cost of the material and labor, but also for its transportation in the car; and (2) that the use of dunnage supplies a deficit in the carrier's cars which under the act it is presumed to furnish, and therefore, proper allowance should be made by the carrier. But in every instance the practice, be it of either nature, must be borne by the party affected without unjust discrimination or be the object of unreasonable charges.

Farmers' Co-op. Assn. vs. C. B. & Q. R. R. Co., 34 I. C. C. Rep. 60, 65.
Western Trunk Line Rules, 34 I. C. C. Rep. 554, 578.
Best & Co. vs. G. N. Ry. Co., 33 I. C. C. Rep. 1, 4.
Boldt Co. vs. C. R. I. & P. Ry. Co., 33 I. C. C. Rep. 8, 10.
Boise Lumber Co., Ltd., vs. P. & I. N. Ry. Co., 33 I. C. C. Rep. 109, 111.
Kenner Truck Farmers' Assn. vs. I. C. R. R. Co., 32 I. C. C. Rep. 1, 8.
Dunnage Allowances, 30 I. C. C. Rep. 538, 543.
New York Shippers' Protective Assn. vs. N. Y. C. & H. R. R. Co., 30 I. C. C. Rep. 437.
Rates on Bananas from Gulf Ports, 30 I. C. C. Rep. 510, 517.
Lee vs. St. L. S. W. Ry. Co., 29 I. C. C. Rep. 101, 102.
Protection of Potato Shipments in Winter, 29 I. C. C. Rep. 504, 505.
S. W. Mo. Millers' Assn. vs. St. L. & S. F. R. R. Co., 26 I. C. C. Rep. 245, 251.
National Wholesale Lumber Dealers' Assn. vs. A. C. L. R. R. Co., 14 I. C. C. Rep. 154, 160.
A. T. & S. F. Ry. Co. vs. U. S., 232 U. S. 199.

§ 3. Car Furnishing.

See "Car Equipment and Supply," Chap. IV (this volume), Sects. 2, 3 and 4, and Chap. V, Sect. 1.

§ 4. Car Size.

The question of car size enters into the problem of reasonable rates and practices of discrimination. If the shipper orders and uses a car of a certain size, he must pay the rate lawfully applicable to such sized car. But if the load

is delivered to the carrier for loading, the carrier is under the duty of shipping in such a manner as will produce the lowest legal rate.

Clinton Bridge & Iron Works vs. C. B. & Q. R. Co., 20 I. C. C. Rep. 416, 417.

Nor in the failure of the shipper to so load the car as to result in lowest rate, is the carrier responsible.

Consld. W. P. & P. Co. vs. S. P. L. A. & S. L. R. R. Co., 20 I. C. C. Rep. 169, 170.

Carriers provide cars of varying dimensions and capacities, and they provide minimum weights for the several kinds of cars based upon those dimensions and capacities. At times when transportation facilities are inadequate to supply the demand upon them it is frequently difficult or impossible for the carrier to furnish a shipper with a car of the dimensions or capacity desired by him, although the carrier has in its tariffs provisions for the use of such car. Manifestly it is not equitable or proper to require the would-be shipper to pay additional transportation charges for the privilege of using a car of different dimensions or capacity from that which would suit his shipment or forego entirely his desire to ship.

Some carriers provide elastic rules which properly permit the use of cars of different dimensions or capacities when they are furnished by the shipper in lieu of those desired or ordered by the shipper. Other carriers do not so provide; and as a result many instances arise in which the initial carrier under such provision furnishes the shipper with cars at its convenience and connecting carriers that have not adopted similar provisions assess higher charges in accordance with their tariffs, thus imposing upon the shipper a wholly unexpected, and, in the view of the Commission, unreasonable charge.

The Commission believes it to be the duty of every carrier to incorporate in its tariff regulations a rule to the effect that when the carrier can not promptly furnish a car of capacity or dimensions desired by the shipper, and for its own convenience does provide a car of greater capacity or dimensions than that ordered, such car may be used on the basis of the minimum carload weight fixed in the tariff for cars of the dimensions or capacity ordered by the shipper, provided the shipment could have been loaded into or upon car of the capacity or size ordered; and that if a car of a smaller capacity than that ordered by the shipper is furnished, it may be used on the basis of the actual weight when loaded to its full visible capacity, or that that portion of the shipment which can not be loaded into the smaller car will be taken in another car and the shipment treated as a whole on the basis of the minimum fixed for the car ordered by the shipper; and that if the carrier is unable to furnish a car of large dimensions, ordered by the shipper, it may furnish two smaller cars which may be used on the basis of the minimum fixed for the car ordered; it being understood that the shipper may not order a car of dimensions or capacity for which a minimum is not provided in the carrier's tariffs, nor a car of dimensions not in general use.

In all such cases the capacity of the car, ordered, the date of such order, the number, initials, and the capacity of the car furnished should be stated on the bill of lading and the carrier's waybill.

Thus:

"36 ft. 6 in. box car, capacity 40,000 lb. ordered Jan. 1, 1915;
40 ft. 6 in. box car, N. Y. C. 131,568, capacity 80,000 lb., furnished Jan. 4, 1915."

In case of controversy between shippers and carriers caused by absence of such rule from tariffs which provide graduated minima for cars of different sizes the Commission will regard such tariffs as *prima facie* unreasonable.

It is the duty of the carriers to provide reasonable facilities for transportation, and if they cannot furnish equipment to move the carloads provided for in their regulations it is clearly their duty to provide some other method of transporting as one shipment, and at the rate named therefor, such carload weight when tendered by the shipper.

Where two or more carriers publish a joint through rate they must publish in connection therewith one carload minimum weight for the through movement under that rate. This ruling is not to be understood, however, as condemning the publication in joint tariffs and the use of through rates made up in combination on a specific base point and providing one minimum weight in connection with the specified portion of the rate up to the base point and a different minimum weight in connection with the specified portion of the rate beyond the base point.

I. C. C. Tariff Circular 18-A, Rule No. 66.

The law imposes upon carriers the obligation of arranging to every possible extent for through carriage and through shipment. Neither the burden of following his shipment to a connecting point between the two carriers and there transferring it, nor of bearing the expense of such transfer, can be laid upon the shipper. It is not deemed reasonable that in a case of this kind the shipper should be required to pay higher charges than he would have paid had the initial carrier furnished the equipment that is provided for in its tariff and that was ordered by the shipper. The carriers in the different classification

territories ought to have and should provide a uniform rule on this subject.

The Commission holds that where the initial carrier provides in its tariffs that if for its own convenience it furnishes a car larger than that ordered by the shipper, it will be used upon the basis of minimum weight applicable to the car ordered, and the connecting carrier to or over whose line such shipment is moved has not such provision in its tariff, the initial carrier should note upon the bill of lading and upon the waybill or transfer bill, which accompanies the delivery of a shipment to its connecting line, the fact that a car of a certain size was ordered and that a car of certain size was, for its own convenience, furnished by the carrier, to be used on the basis of the minimum weight applicable to the car ordered, and that the connecting carrier, receiving such notice on the waybill or transfer bill, and not having a provision in its tariff which permits the use of the car on the basis of the lower minimum weight, should transfer the shipment into a car of the size or capacity ordered by the shipper or into a car to which the same minimum weight applies, without additional expense to the shipper.

This ruling outlines the policy which the Interstate Commerce Commission follows in cases of this nature which may be brought before it. It is, of course, understood that the shipper may not demand any car that is not provided for in the initial carrier's tariff.

Confr. Rulings Bull. No. 6, Ruling No. 274, Pars. (b) and (c), of March 15, 1910.

See also, in this connection, "Weights and Weighing," Part II, "Special Freight Services," Chapters II and III.

See—

Funck Lumber Co. vs. B. & O. S. W. R. R. Co., 33 I. C. C. Rep. 511.
Knight Woolen Mills vs. C. & N. W. R. R. Co., 32 I. C. C. Rep. 490, 493.
McLoughlin vs. T. & P. Ry. Co., 26 I. C. C. Rep. 307.
Atlas Lumber & Shingle Co. vs. N. P. Ry. Co., 26 I. C. C. Rep. 313.
In re Wool, Hides and Pelts, 25 I. C. C. Rep. 185, 188.
Leach vs. N. P. Ry. Co., 25 I. C. C. Rep. 275.
Riverside Mills vs. G. R. R. Co., 25 I. C. C. Rep. 434.
In re Suspension of Western Classification No. 51, 25 I. C. C. Rep. 442.
Riverside Mills vs. St. L. & S. F. R. R. Co., 24 I. C. C. Rep. 264.
Weber & Co. vs. H. T. & W. R. R. Co., Unrep. op. A-23.
Carstens Packing Co. vs. S. P. Co., 23 I. C. C. Rep. 236, 237.
Lindsey Bros. vs. L. S. & M. S. Ry. Co., 22 I. C. C. Rep. 516, 518.
Milburn Wagon Co. vs. L. S. & M. S. R. R. Co., 22 I. C. C. Rep. 511, 512.
Noble vs. B. & O. R. R. Co., 22 I. C. C. Rep. 432.
Minneapolis Threshing Mch. Co. vs. C. M. & St. P. Ry. Co., 21 I. C. C. Rep. 181.
Noble vs. B. & O. R. R. Co., 20 I. C. C. Rep. 72.
Hull Co. vs. C. M. & St. P. Ry. Co., 21 I. C. C. Rep. 486.
Clinton Bridge & Iron Works vs. C., B. & Q. R. R. Co., 20 I. C. C. Rep. 416, 417.
Consld. W. P. & P. Co. vs. S. P. L. A. & S. L. R. R. Co., 20 I. C. C. Rep. 169, 170.
Arlington Heights Fruit Exchange vs. S. P. Co., 20 I. C. C. Rep. 106, 117.
Oregon Lumber Co. vs. O. R. R. & N. Co., 19 I. C. C. Rep. 582.
Carstens Packing Co. vs. S. P. Co., 17 I. C. C. Rep. 6.
Kaye & Carter Lumber Co. vs. M. & I. Ry. Co., 17 I. C. C. Rep. 209, 211.
Slimmer & Thomas Co. vs. Penna. Co., 16 I. C. C. Rep. 531, 533.
Wheller, etc., Co. vs. S. P. Co., 16 I. C. C. Rep. 547, 548.
Yorke Furniture Co. vs. S. Ry. Co., 78 S. E. Rep. 67, 68.
I. C. C. Unrep. ops. Nos. 181, 414, 417, 420, 455, 461, and 581.

It is not unreasonable for carriers to provide that minimum weights applicable to special cars will not be protected unless carrier has failed for six days, excluding the day of notice, to furnish a car of the size ordered, but this ruling does not relieve carriers from the duty of furnishing the equipment ordered within a reasonable time. It simply fixes a definite period beyond which the duty to furnish other equipment in lieu of that order shall attach.

In each of the interstate classification schedules—the Official, Southern and Western Classifications—the following rule is included governing the ordering of cars:

"(A) When articles subject to the provisions of this rule are loaded in or on cars 36 feet 6 inches or less in length they shall be charged at the minimum carload weights specified therefor in the Classification (actual or estimated weight to be charged for when in excess of the minimum weight). Except as provided in Sections B and C, if such articles are loaded in or on cars exceeding 36 feet 6 inches in length, the minimum carload weights to be charged shall be as provided in Section F (actual or estimated weight to be charged for when in excess of the minimum weight). (See Note 1.)

"(B) When a shipper orders a car 36 feet 6 inches or less in length for articles 'subject to Rule 27 (Official) (Rule 6-B in Western and Rule 24 in Southern),' and the carrier is unable to furnish car of desired length when ordered, a longer car will be furnished under the following conditions:

"1st. If the carrier is unable to furnish car of the desired length, but furnishes a longer car not exceeding 40 feet 6 inches in length, the minimum weight for the car furnished shall be that fixed for the car ordered, except that when the loading capacity of the car is used the minimum weight shall be that fixed for the car furnished.

"2nd. If the carrier is unable to furnish car of the desired length or in place thereof a car not exceeding 40 feet 6 inches in length within six (6) days from the date car is ordered, and after the expiration of such period furnishes a longer car than ordered, the minimum weight for such car shall be that fixed for the car ordered, except that when the loading capacity of the car is used the minimum weight shall be that fixed for the car furnished.

"If a longer car than ordered is furnished, the following notation must be made by agent on bill of lading and waybill:

"'Car.....ft. in length ordered by shipper on.....(date); car.....ft. in length furnished by carrier on.....(date); under Rule 27, Official Classification.'

"(C) When a shipper orders a car over 36 feet 6 inches in length for articles 'subject to Rule 27,' and car of the length ordered cannot be furnished within six days after receipt of order (see Note 2), carrier will, after expiration of such period, furnish a longer car or two shorter cars under the following conditions:

"1st. If the carrier is unable within six days after receipt of order (see Note 2) to furnish car of the length ordered and furnishes a longer car, the minimum weight shall be that fixed for the car ordered, except that when the loading capacity of the car is used the minimum weight shall be that fixed for the car furnished.

"If a longer car than ordered is furnished the following notation must be made by agent on bill of lading and waybill:

"'Car.....ft. in length ordered by shipper on.....(date); car.....ft. in length furnished by carrier on.....(date); under Rule 27, Official Classification.'

"2nd. If the carrier is unable within six days after receipt of order (see Note 2) to furnish car of the length

ordered or a longer car than ordered and furnishes two shorter cars in place of the car ordered, one of the cars (the longer car of the two if of different lengths and subject to different minimum carload weights when loaded singly) shall be charged the minimum weight fixed for such car (actual or estimated weight if greater) and the remainder of the shipment loaded in or on the other car shall be charged at actual or estimated weight and carload rate, but in no case shall the total weight charged for the two cars be less than the minimum weight fixed for the car ordered, except that when articles are loaded on flat or gondola cars, and are of such continuous length as to rest upon both cars, or are loaded on one car and extend over the other car, the shipment shall be subject to the minimum carload weight applicable to the car of size ordered (provided the articles are of such length as could have been loaded on car of size ordered), actual weight to be charged for if in excess of such minimum weight.

"When two shorter cars are furnished in place of the car ordered, the following notation must be made by agent on bill of lading and waybill:

"'Car.....ft. in length ordered by shipper on.....(date); two cars.....ft. and.....ft. in length furnished by carrier on.....(date); under Rule 27, Official Classification.'

"(D) Except when furnished by carrier in place of a shorter car ordered, if a car over 36 feet 6 inches in length is used by shipper for loading articles 'subject to Rule 27,' without previous order having been placed by shipper with carrier for a car of such size, the minimum weight shall be that fixed for the car used.

"(E) Rule 5-C and Rule 7-A will not apply to articles 'subject to Rule 27' unless otherwise provided in the description of such articles in the Classification or in the tariffs of individual carriers."

"(F)" This section contains table of graduated carload minimum weights for which refer to "Weights and Weighing," this volume, Chap. IV, "Carload Minimum Weights."

"Note 1.—The length of cars referred to in this rule is based on the platform measurement of flat cars and inside measurement of all other cars, except that on refrigerator cars having ice boxes constructed in ends thereof extending from top of car partially to floor thereof, the length shall be computed from the inward side of the ice box.

"The platform measurement of flat cars and the inside measurement of other cars must be shown on manifests and transfer slips to connecting lines.

"Fractions of an inch will not be counted in computing length of cars.

"Note 2.—Time will be computed from the first day after the day on which order is received by carrier. In computing time Sundays and legal holidays (national, state and municipal) will be excluded. When the last day of the six day period is a Sunday or a legal holiday, the day following will be considered the last of the six days. When a legal holiday falls on a Sunday, the following Monday will be treated as a legal holiday."

It is not unreasonable for carriers to provide that minimum applicable to special car would not be protected unless carrier has failed for six days, excluding day of notice, to furnish a car of the size ordered. Where, however, the carrier in its tariffs establishes particular minima as applicable to cars of given dimensions it must furnish a car of the size provided for in the tariff and ordered by the shipper; or, in case of its inability to do this, it must provide other equipment under such conditions as fairly to protect the minimum of the car ordered, and its tariffs should contain a provision to that effect.

Noble vs. B. & O. R. R. Co., 22 I. C. C. Rep. 432.

Likewise, the initial carrier should establish the rule that when a car of the capacity or dimensions ordered cannot be furnished after six full days' notice therefor has been given by the shipper, and a larger car is furnished by the carrier, the larger car shall be used on the basis of the minimum for the car ordered, provided the shipment could have been loaded upon or in the car of the size ordered.

> Milburn Wagon Co. vs. L. S. & M. S. R. R. Co., 22 I. C. C. Rep. 511, 512.

The carrier having permitted the use of different sizes of cars by shippers, when the shipper makes his selection of the size of car that will most economically receive and carry his shipment under the provisions of the carrier's tariff, the carrier is bound by the law and the regulations of the Commission to protect the minimum carload weight established for the size of car ordered, no matter what size of car the carrier may actually furnish.

§ 5. Cars Off Line.

Cars off the line of the owning carrier become an important subject of consideration only in connection with the distribution of equipment to shippers and with the car service afforded through routes. Under the full intent of the regulating laws the railroads of the country are called upon so to unite themselves that they will constitute one national system, establishing through routes as required by the act, keeping such through routes open and in operation, furnishing necessary facilities for transportation over such through routes, and making reasonable charges, rules, regulations and practices as between themselves and the shippers and as between each other. The carriers must serve the through routes established with

other carriers without respect to the fact that in rendering such service their equipment may be carried beyond their own lines.

The carrier only meets this obligation of the law when it equips itself with sufficient cars to meet the requirements of its shippers and establishes with its connections equitable car interchange arrangements. Many carriers have in the past established restrictions of the movement of their cars off their own lines, but such practice is rapidly disappearing, except under justifying and non-discriminating circumstances, in the practically universal interchange of cars between the carriers of the entire country.

The carrier may not be successfully heard to excuse its obligation under the act to establish and operate through routes by restricting the movement of its equipment to its own rails. The mandate of the statute is that "it shall be the duty of every carrier subject to the provisions of this act . . . to establish through routes and just and reasonable rates applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto." This language indicates clearly the intent of Congress that the commerce between the states shall flow freely in established channels, without hindrance, embarrassment or delay. The full burden of this great obligation is cast upon the carriers.

This requirement appears in Section 1 of the act and the remedy, if it is violated by the carriers, is found in Section 15 of the act. It is notable that in order for this intended effect upon our commerce to be realized a proper relationship between the carriers themselves must be maintained.

The authority of the Interstate Commerce Commission to regulate and control the practices affecting this obligation on the part of the carriers has been approved by the Supreme Court of the United States in the cases of Interstate Commerce Commission vs. I. C. R. R. Co., 215 U. S. 452, and Baltimore & Ohio Railroad Company vs. United States, *ex rel.* Pitcairn Coal Co., 215 U. S. 481. While it is true that these two decisions deal entirely with the relation between the carriers and their shippers, the power in the Commission to regulate and control the relationship between carriers as affecting this great obligation of the act is necessarily incident to and an essential part of the duty of the Commission to protect the shipper in his relationship with the carrier. Since the law requires that the carrier must furnish the shipper with proper equipment and maintain its through routes, and charges the Interstate Commerce Commission with the duty of seeing to it that the carriers comply with this mandate of the act, necessarily the Commission must have power to enforce rules between carriers which will permit the free interchange of traffic as between such carriers. In other words, as the Commission itself declares, "the carriers must keep their through routes open, and if they fail to do this because of the diversion or appropriation of cars, this Commission has it within its power to prescribe the conditions upon which such through routes shall be operated."

Again, the Commission has said in passing upon restrictive car movement regulations of the owning carrier:

"There may be times when an embargo is justifiable because of the physical inability of the carrier for some reason to deal with the traffic which overwhelms it," but such an embargo must not violate the requirements of the law or be inconsonant with the services which the carriers constituting the through route are required to give.

It is the duty of the initial carrier to furnish equipment for a shipment which moves over its line on to other lines, and in cases where that is impracticable or deemed unwise the carriers assume to bear the burden of transferring the shipment from the car of one line to that of the other. By agreement the carriers have fixed the rental value of cars for their own purposes at forty-five cents per day, but whether this is "reasonable compensation," as required in the act for those entitled thereto, or not, does not relieve the carrier from its duty to keep the through routes open and furnish the necessary equipment therefor moving beyond its own line. So, the rule is that the carrier may establish restrictions upon the movement of its equipment off its own line only when such regulations or practices in no way violate the mandate of the act—either to the extent that the flow of commerce between the states is hindered, embarrassed or delayed, or that unjust discriminations and hardships shall be visited upon the shippers.

Mo. & Ill. Coal Co. vs. I. C. R. R. Co., 22 I. C. C. Rep. 39.
Doran & Co. vs. N. C. & St. L. Ry. Co., 33 I. C. C. Rep. 523, 530.
Pine Belt Lumber Co. vs. G. & S. I. R. R. Co., 33 I. C. C. Rep. 117, 118.
Penna. Paraffine Works vs. P. R. R. Co., 34 I. C. C. Rep. 179, 193.
New Mexico vs. A. T. & S. F. Ry. Co., 34 I. C. C. Rep. 292, 310.
Rental Charges for Insulated Cars, 31 I. C. C. Rep. 255, 256.
National Casket Co. vs. S. Ry. Co., 31 I. C. C. Rep. 678, 696, 693.
C. & N. W. Ry. Co. Reconsignment Rules, 29 I. C. C. Rep. 620, 623.
Anaconda Cooper Mfg. Co. vs. C. & E. R. Co. et al., 19 I. C. C. Rep. 592, 595.
Ruttle vs. P. M. R. Co., 13 I. C. C. Rep. 179.
Memphis Frt. Bureau vs. Ft. S., T. W. R. R. Co., 13 I. C. C. Rep. 1.
Traer vs. C. & A. R. R. Co., 13 I. C. C. Rep. 451.
C. & M. E. R. Co. vs. I. C. R. Co., 13 I. C. C. Rep. 20.

See also earlier decisions prior to amendment of Section 15 of the Act to Regulate Commerce:

Am. Nat. L. S. Assn. vs. T. & P. R. Co., 12 I. C. C. Rep. 32.
Cedar Rapids, etc., Ry. & L. Co. vs. Chicago, etc., R. Co., 13 I. C. C. Rep. 250.
In re Car Shortage, etc., 12 I. C. C. Rep. 561.

As a condition of transportation the matter of cars off line is closely related to the subject of reconsignment and diversion, and reference should be made thereto in the next volume of this series.

CHAPTER VII.

CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1. Distribution of Cars Among Shippers; Duty of Carrier.
(1) Carriers Parties to Through Routes Must Furnish Cars.
§ 2. Impracticability of Fixed Rules of Distribution.
(1) Car Regulations.
(2) Counting of Cars.
(3) Private Cars.
(4) Foreign Cars.
(5) Railway Fuel Cars.
§ 3. Car Distribution in Order of Application.

CHAPTER VII.

CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1. Distribution of Cars Among Shippers; Duty of Carrier.

It is the duty of carriers subject to the Act to Regulate Commerce to furnish to shippers, according to their respective ability, such equipment as is necessary to afford to the shipping public, upon reasonable request, the "transportation" defined in the first section of the act, as well as to keep open and operate the through routes required by the statute. The obligation to furnish cars to shippers rests upon all carriers parties to joint rates or constituting a through route. This is an enlargement of the carrier's obligation at common law. But, although the extent of the carrier's obligation at common law to furnish cars is not determinative of its obligation under the act, should a carrier absolutely refuse to furnish a shipper with cars, the courts could take primary jurisdiction. Both the act and the common law put the burden upon the carrier to show cause for its failure to supply cars to shippers.

The Interstate Commerce Commission sought in both the Vulcan Coal & Mining Company and the Paraffine Works cases to extend its authority over the furnishing of cars by carriers subject to the act to the extent of requiring carriers to acquire necessary equipment if they did not already possess it, but the special Federal Court in the Par-

affine Works Case denied its competency so to do. But, nevertheless, it is the unquestioned duty of the carriers to furnish cars suitable to transport in safety the traffic which they hold themselves out to carry. As explained in a previous section, the carrier may, through its published tariffs, put itself in a position where it could be compelled in the courts to acquire necessary equipment which it did not already possess. The ruling of the court in the Paraffine Works Case was that the naked provisions of the act absolved the carrier from any duty to furnish cars other than those within its ability to furnish, and "ability" in this sense must be understood (said the court) to mean its "present ability" and not an "ability" it might acquire in the future.

However, where a carload rate and a minimum weight for a car of definite kind or dimensions are lawfully published in the tariffs of the carrier, this act of the carrier constitutes an open offer to the shippers to move their traffic on the terms of the tariffs, and it would be wholly unsound in law to permit the carrier to escape from the obligation to furnish the equipment necessary to fulfill the promises in its tariffs simply because the carrier was not provided with the cars of the dimensions specified in the tariffs or of the kind required for the safe conveyance of such property. In other words, whenever a carrier holds itself out in its tariffs as a carrier of certain kind or kinds of freight, it is its plain duty to furnish cars sufficient to transport such property, and the carrier may not, either at common law or under the statute, escape from that duty.

Penna. Paraffine Works vs. P. R. R. Co., 34 I. C. C. Rep. 179, 187, 189, 194.

Farmers' Co-op. Assn. vs. C. B. & Q. R. R. Co., 34 I. C. C. Rep. 60, 63, 64.

Vulcan Coal & Mining Co. vs. I. C. C. R. R. Co., 33 I. C. C. Rep. 52, 65, 70, 71.

Campbell's Creek Coal Co. vs. A. A. R. R. Co., 33 I. C. C. Rep. 558, 562.
Am. Live Stock Assn. vs. S. P. Co., 32 I. C. C. Rep. 515, 520.
Wabash Sand & Gravel Co. vs. Vandalia R. R. Co., 31 I. C. C. Rep. 344.
Pittsburgh & S. W. Coal Co. vs. W. P. T. Ry. Co., 31 I. C. C. Rep. 660, 663.
Lumber Rates through Ohio River Crossings, 29 I. C. C. Rep. 38, 39, 40.
Campbell's Creek Coal Co. vs. A. A. R. R. Co., 29 I. C. C. Rep. 682, 690.
C. & N. W. Ry. Co. Reconsignment Rules, 29 I. C. C. Rep. 620, 624.

It has been repeatedly and consistently held by the Commission that the assignment and distribution of cars to shippers must be free from unjust discrimination, and the court in the Paraffine Works Case called attention to the many decisions by the Supreme Court of the United States upholding this authority in the Commission. It is the duty of the carrier when the supply of cars is inadequate to distribute fairly the available equipment among all shippers, according to their respective traffic. Manifestly it is the duty of the carrier to accommodate the needs and necessities of its shippers as nearly as is possible without discrimination against any one of them. In this respect the section of the act requiring the carriers to furnish "transportation" (including the vehicles and cars used therein) must be read in connection with the sections of the law prohibiting discriminations. It is clearly the law that discrimination between shippers must not exist in the assignment and distribution of cars, but that in each case the question of fact as to the existence of discrimination and its effect must be determined with respect to the ability of the carrier to furnish equipment demanded.

Some of the earlier cases before the Commission are of interest in this regard. The inability of the carrier result-

ing from a car famine to furnish a shipper instantly upon demand all the cars it needs for the shipment of his commodities is not subjecting that shipper to "any undue or unreasonable prejudice or disadvantage in any respect whatever," within the meaning of Section 3 of the Act to Regulate Commerce, where, in the actual distribution, there is no preference shown between shippers. In a crisis of this kind, if the carriers cannot furnish sufficient cars to all the shippers along their lines for the movement of accruing freight, it is their duty to furnish cars to shippers in equitable proportion to their tonnage over the line of railroad upon a basis of assignment that is relatively and substantially just. In other words, inasmuch as it is obviously the duty of the carrier to provide adequate equipment, within its ability, for the business of its line in times of special stress, some one must wait, and the annoyance must be distributed with all possibly equality. In this respect regular customers are not entitled to preference over occasional shippers. The unusual fluctuations and unforeseen developments of commerce, or the fault or misfortune of some one or more carriers, may occasionally bring about a condition of affairs in which the best managed railroad, with the most ample freight equipment, would be unable to move at once as tendered all the freight upon its line, and this without any fault of its own. In one of its earliest cases the Commission held that the inability of a carrier to furnish cars as fast as demanded by shippers was not a violation of the statute, where the carrier had an adequate supply of freight equipment for ordinary conditions, but owing to an extraordinary demand for a certain kind of car was unable to supply them as fast as the shippers demanded. In such a case the carrier performed its duty when it furnished the cars ratably and fairly to the shippers along its line in proportion of their

shipments until the emergency passed. In this connection see "Detention of Cars by Shippers." It is also well held that a carrier is not responsible for the detention of cars by shippers longer than is necessary, when that carrier does all in its power to enforce the prompt unloading and release of the cars.

Many intricate questions have confronted the Commission in the distribution of equipment to shippers, the more notable of which concerned the assignment of coal car equipment to mines. The Commission's regulations of coal car service were sustained by the Supreme Court of the United States in I. C. C. vs. I. C. R. Co., 215 U. S. 452. See "Car Distribution to Coal Mines," this volume, Chap. VIII.

Am. Creosoting Works vs. I. C. R. R. Co. et al., 15 I. C. C. Rep. 160, 164.
R. R. Com. vs. H. V. R. R. Co., 12 I. C. C. Rep. 398.
Eaton vs. C. H. & D. R. R. Co., 11 I. C. C. Rep. 619.
Richmond Elevator Co. vs. P. M. R. R. Co., 10 I. C. C. Rep. 629.
Riddle, Dean & Co. vs. P. & L. E. R. R. Co., 1 I. C. C. Rep. 490, 1, I. C. R. 773.
Act to Reg. Commerce (Amd. 1910), Sect. 3.

See also—

Bulah Coal Co. vs. P. R. R. Co., 20 I. C. C. Rep. 52.
Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. Rep. 356.
Traer vs. C. & A. R. R. Co., 13 I. C. C. Rep. 451.
Royal Coal & Coke Co. vs. So. Ry. Co., 13 I. C. C. Rep. 440.
R. R. Com. vs. H. V. R. R. Co., 12 I. C. C. Rep. 398.

involving coal car distribution systems.

(1) **Carriers Parties to Through Routes Must Furnish Cars.** The obligation to furnish cars for transportation over through routes composed of two or more carriers is a joint obligation and rests upon all carriers participating

in the route, but this duty operates first upon the initial carrier whose obligation is to furnish equipment for shipments which move on to other lines. In cases where this is impracticable or deemed unwise the carriers in the route assume to bear the burden of the transfer from the equipment of one line to that of the other.

Lumber Rates through Ohio River Crossings, 29 I. C. C. Rep. 38, 39.
C. & N. W. Ry. Reconsignment Rules, 29 I. C. C. Rep. 620, 624.
P. & S. W. Coal Co. vs. W. P. T. Ry. Co., 31 I. C. C. Rep. 660, 663.
Missouri & Illinois Coal Co. vs. I. C. R. R. Co., 22 I. C. C. Rep. 39.
I. C. C. Confr. Rulings Bull. No. 6, Ruling No. 59.
Act to Reg. Com. (Amd. 1910), Sect. 1 and Sect. 3.

§ 2. Impracticability of Fixed Rules of Distribution.

No exact rule can be laid down to govern the general distribution of cars between different localities and different species of traffic. Shippers must be reasonable in their demands and carriers diligent and honest in meeting those demands. The primary obligation of the amended act is that the carriers shall observe and enforce just and reasonable regulations and practices affecting facilities for transportation and all other matters related to or connected with the transportation of property within the purview of the law.

As was said by the Commission, in Rail and River Coal Co. Case, 14 I. C. C. Rep. 86, decided before the curative amendment to Section 15 of the act was passed, the spirit and letter of the act require of the carrier, in the distribution of its equipment during periods of car stress, the highest degree of reasonableness and impartiality compatible with the conditions and circumstances confronting both the shipper and the carrier. It is obvious, however,

that any fixed, arbitrary or inelastic rule of distribution would more often conform to the whims and caprices of heavy shippers than to effect the relief of the necessities of smaller shippers.

The vagaries of commerce and the peculiarities of traffic are of such a constantly varying nature that no general rule of distribution of equipment would result competently. It is, therefore, essential, if justice is to be served, that each case with its especial conditions and species of traffic be considered alone and upon it's own particular facts.

The distribution of cars for the transportation of coal, grain and fruit traffic has presented to the Commission the more alarming phases of this question. See "Coal Car Distribution Systems," this volume, Chapters VIII, IX and X.

Instead of a fixed rule for the distribution of the carriers' equipment among shippers, the test of proper distribution must be that localities as well as shippers must not be prejudiced by unjust discriminations in the supply of cars, and that when, in times of stress, the carriers cannot furnish sufficient cars to all shippers along their lines as demanded, the distribution must be in proportion to the shippers' tonnage upon a basis that is relatively and substantially just.

Beyond this, special systems of distribution may be enforced by the Commission to meet the needs and necessities of special species of traffic, such as coal, grain, fruit, etc., but these special car service systems will be found described under their appropriate heads in subsequent sections of this volume.

Hawkins vs. W. & L. E. R. R. Co., 9 I. C. C. Rep. 212.
Act to Reg. Com. (Amd. 1910), Sect. 1, Par. 4.
Powhatan Coal & Coke Co. vs. N. & W. R. R. Co., 13 I. C. C. Rep. 69, 81.

(1) **Car Regulations.** While the Commission's jurisdiction over car-distribution rules is absolute, and confirmed by the Supreme Court of the United States in numerous cases, a competent set of rules governing the distribution of its cars should be, in the first instance, made by the carrier. This statement of the jurisdiction of the Commission is found in the fifteenth section of the Act to Regulate Commerce. It brings within the authority of the Commission all regulations and practices of carriers under which they offer their services to the shipping public and conduct their transportation.

In the Illinois Central Railroad coal car case, 215 U. S. 452, 474, the Supreme Court of the United States declared the equipment of a railroad company engaged in interstate commerce to be an instrument of commerce embraced within the governmental power of regulation, which power, in the case of car shortage, extended to compel a just and equal distribution of equipment to shippers to the end that the prohibited discriminations might be prevented.

Again, as a factor affecting the regulation of rates, the basis of a car distribution system comes within the original jurisdiction of the Commission.

Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. Rep. 86, 91.
Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. Rep. 356, 358.

(2) **Counting of Cars.** It is not to be assumed that cars may be justly and equally distributed among shippers upon a numerical basis proportionately related to the aggregate amount of equipment owned or possessed by the carrier. Such a system of counting cars for distribution would be both vicious and prejudicial in the extreme. In a majority of instances the larger shippers would enjoy

the advantage, and the smaller shipper become paralyzed; one kind of traffic would move at the cost of another, and certain localities would become unnaturally dominant in trading territories. Such a basis of equipment allotment has been condemned by the Commission on numerous occasions, for the reason that it evades recognition of the relative rights of shipper, locality and traffic. How manifestly unfair it would be to base the allotment ratio of ventilator cars upon all cars owned by the system or in the possession of the system of every description and class! Before the assignment of cars had proceeded to any extent, the result of the ratio would be nil. Or on the other hand, could a more appalling injustice be perpetrated than to determine the ratio of coal cars to be assigned a mine on the basis of the requirements of the grain traffic on the line? Or, again, what more unjust discrimination could occur than to use the necessities of one locality for the basis of distribution in another locality?

If no shortage of cars exists, then, of course, no special system of distribution is necessary, so long as the carriers furnish proper equipment to meet the necessities of commerce, but in the time of stress, when the burden of disadvantage must be justly apportioned among the shippers, the need of a car-service system commensurate with the conditions and circumstances of the crises must be put into effect. And such system must be made adaptable to the species of the traffic and the commercial relationships of the shippers. It is upon these elements that the carriers should establish their basis for the fair and just distribution of cars. The fairness of a system of distribution can only be appraised from the standpoint of the relative needs of shippers and the availability of equipment suitable to their pending shipments. If a carrier in good faith attempts to distribute cars on such a basis of fairness,

considering both the species of the traffic and the situation of the respective shippers, it can not be held unduly to discriminate against shippers upon whom commercial misfortunes operate to reduce their relative share of the equipment, for, if that action upon the part of the carrier under such circumstances were to be held to constitute unjust discrimination, then no general scheme of car distribution could be safely employed. Otherwise the assignment of cars to shippers would revert to the old and evil system where the agents of the carrier having control of the car supply made their allotments, not in accordance with any general principle of fairness and equality, but according to their own misguided discretion.

National Coal Co. vs. B. & O. R. R. Co., 28 I. C. C. Rep. 442, 444.

See citation of authorities in connection with "Car Distribution to Mines," this volume, Chaps. VIII, IX and X.

It was held in the Hillsdale Coal & Coke Company Case, *supra*, that a rule that a car placed too late for loading on one day will not be counted as available for loading until the following day is not unlawful.

(3) **Private Cars.** While the Commission had made rulings with respect to the inclusion of private cars in available equipment for distribution prior to its decisions in the Vulcan Coal & Mining Company and Paraffine Works cases, *supra*, in their later cases it laid down the unqualified rule that all cars used by carriers, whether owned by the carriers themselves or leased from private car lines or from shippers, must be distributed without discrimination.

Penna. Paraffine Works vs. P. R. R. Co., 34 I. C. C. Rep. 179.
Vulcan Coal & Mining Co. vs. P. R. R. Co., 33 I. C. C. Rep. 52.
In re Irregularities in Mine Ratings, 25 I. C. C. Rep. 286, 297.

See also—

Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. Rep. 356.

This power in the Commission has been upheld by the Supreme Court of the United States as a proper exercise of its administrative authority over car distribution.

T. & P. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.
B. & O. R. R. Co. vs. Pitcairn Coal Company, 215 U. S. 481.
Robinson vs. B. & O. R. R. Co., 222 U. S. 506.
Morrisdale Coal & Coke Co. vs. P. R. R. Co., 230 U. S. 304.

See also—

U. S. vs. Pacific & A. R. & Nav. Co., 228 U. S. 87.
P. R. R. Co. vs. International Coal Mining Co., 230 U. S. 184.
Mitchell Coal & Coke Co. vs. P. R. R. Co., 230 U. S. 247.
So. Ry. Co. vs. Reid, 222 U. S. 424.

The use of private cars early in the history of the regulating system brought to light many abuses in the form of undue discriminations. The attention of the Commission was directed to the insufficiencies in the unamended act to cope with the evil. In accordance with the recommendations of the Commission the first section of the act was amended so as to bring under its control and regulation private cars either owned, leased or used by private car lines or by shippers, used in transportation, and all the facilities of transportation used in interstate commerce. The argument is well based in law that where the carrier accepts and uses cars owned by shippers and others, it in legal contemplation adopts them as its own for the purposes of rates and carriage, and the carrier may not by any device, such as the payment of unreasonable rent, avoid the duty of equal charges for equal service.

In this connection it is well to note the finding of the Commission in the California Fruit Case, reported in I. C.

C. Rep. 182. In that case it was apparent that the leasing of cars by carriers of fruit requiring refrigeration in transit afforded opportunities for unfair advantages. However, the language of the act permitted the carrier to procure equipment for its traffic by lease as well as by purchase. It was not prohibited from leasing a car from a shipper, nor was the carrier compelled to lease from all shippers because it rented from one. With the amending of the act, as heretofore stated, it was made the duty of the carrier to equip its road with the means of "transportation" as defined in the law, and within its ability. In the absence of exceptional conditions, such means must be afforded to all shippers of like traffic impartially and without prejudice or disadvantage. In this connection the Commission in one of the early tank car cases held that the ownership of a car rented to a carrier for a full consideration did not of itself entitle the owner of the car to its exclusive use, and that if he could stipulate for its use, the terms must be such as would not constitute undue discrimination against shippers of like traffic excluded from use of the car. Usually carriers pay a mileage for a car which is employed in the service of the shipper, and in legal contemplation it is the carrier, and not the person or company owning the car, who furnishes the car to the shipper, there being in such case no privity of contract between the owner of the car and the shipper using it.

See Annual Report of Interstate Commerce Commission for 1904. (This report was made prior to the amendment of the Act.)

See also Judson on Interstate Commerce, 2nd ed., Sects. 253 and 257.

See also Rental Charges for Insulated Cars, 31 I. C. C. Rep. 255, 256.

(4) **Foreign Cars.** The exchange and interchange of cars between carriers, which in the spirit of the law so

unite their lines and facilities as to form a national railroad system, causes the working equipment of the average railroad to consist in a large degree of foreign cars, i. e., cars belonging to other lines.

Restrictions imposed by carriers upon the movement of their own equipment confining the use of their cars to their own lines are looked upon with disfavor by the regulating authority. The first section of the amended act requires the carriers subject to its provisions to establish and operate through routes and to provide reasonable facilities for operating such routes, including reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein. This means that the carrier only fulfills its obligation under the law when it equips itself with sufficient cars to meet the needs of its shippers, both as to local and interline traffic, and establishes with its connections equitable car-interchange arrangements.

The owning line is compensated by the using carrier for its equipment under an established scale of car per diem, and the foreign car is treated as a part of the available equipment of the carrier on whose line it is in use. (See Note.) All cars tendered by a railroad company, including both its system cars and foreign line equipment, for the movement of its traffic must be treated as its own for the purposes of transportation. And it is not a valid excuse for the carrier's failure to furnish cars that its own cars must pass off its line.

Penna. Paraffine Works vs. P. R. R. Co., 34 I. C. C. Rep. 179, 193.

Vulcan Coal & Mining Company vs. I. C. R. R. Co., 33 I. C. C. Rep. 33 I. C. C. Rep. 52.

See also—

Rental Charges for Insulated Cars, 31 I. C. C. Rep. 255, 256.

Downie Pole Co. vs. N. P. Ry. Co., 31 I. C. C. Rep. 142, 143.

Lumber Rates through Ohio River Crossings, 29 I. C. C. Rep. 38, 39.
C. & N. W. Ry. Co. Reconsignment Rules, 29 I. C. C. Rep. 620, 624.
Campbell's Creek Coal Co. vs. K. & M. Ry. Co., 29 I. C. C. Rep. 682, 691.
Peale, Peacock & Kerr vs. C. R. R. Co. of N. J., 18 I. C. C. Rep. 25, 34.
Nebraska-Iowa Grain Co. vs. U. P. R. R. Co., 15 I. C. C. Rep. 90, 96.
Act to Reg. Com. (Amd. 1910), Sects. 1 and 3.

See also authorities cited in connection with "Private Cars," sub. (3), this section, where the Supreme Court of the United States has affirmed the power in the Commission to regulate the distribution of carriers' equipment.

NOTE:—A car per diem charge is a fixed amount paid per day per car for all days that the car is on a foreign line.
National Casket Co. vs. So. Ry. Co., 31 I. C. C. Rep. 678, 692, 693.

(5) Railway Fuel Cars. See "Car Distribution to Coal Mines," this volume, Chapters VIII, IX and X.

§ 3. Car Distribution in Order of Application.

A rule by which a carrier apportions cars in time of great scarcity by giving the first car to the first shipper ordering and the second to the next shipper ordering, and so on, may be entirely just; but, on the other hand, where one shipper having a large quantity of freight to ship, orders a large number of cars, while other shippers may have but on occasional carload, rigid adherence to such a rule might prove decidedly unjust.

Richmond Elevator Co. vs. P. M. R. R. Co., 10 I. C. C. Rep. 629.

While this rule could not equitably be followed in distributing cars to coal mines, there are conditions of trans-

portation under which it may properly be applied. Its application, however, must be consonant with the spirit of the law. It is the duty of the common carrier to provide adequate equipment for the business of its line, and if in the time of special stress in the availability of cars shippers must wait for equipment, this annoyance must be distributed with all possible equality among all of the shippers.

See "Car Distribution to Coal Mines; Mine Ratings," this volume, Chapters VIII, IX and X.

See also—

Powhatan Coal & Coke Co. vs. N. & W. Ry. Co., 13 I. C. C. Rep. 69.
R. R. Com. of Ohio vs. H. V. Ry. Co., 12 I. C. C. Rep. 398.
Eaton vs. C. H. & D. Ry. Co., 11 I. C. C. Rep. 619.

CHAPTER VIII.

CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1. Car Distribution to Coal Mines; Mine Ratings.
(1) Physical Capacity Less Railway Fuel Coal.
(2) Commercial Capacity Plus Physical Capacity.
(3) Mine Capacity Versus Shipments.
(4) Hourly Basis.
(5) Coke Oven Basis.

CHAPTER VIII.

CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1. Car Distribution to Coal Mines; Mine Ratings.

Probably no one question involving transportation practices has been more carefully considered by the Interstate Commerce Commission than that of the distribution of cars to coal mines. Shortages in coal car equipment have, unfortunately, been of frequent occurrence in the past, causing both distress in business and misery among individuals. Early in the history of the Commission many vicious practices and preferences in the supplying of cars to coal mines were found to exist. The ownership of coal mines by railroad interest gave rise to many forms of discrimination and favoritism in the distribution of coal cars.

Under the common law the courts had held that it was the duty of the carrier in furnishing cars to coal mines along its line to distribute them impartially and without unjust discrimination or preference. In the West Virginia & Northern Railroad Company Case (125 Fed. Rep. 252) the court declared that the distribution of cars to coal mines should be based upon disinterested and intelligent examination of the mines by experts and upon a consideration of all the factors which go to make up the capacity of the mines, the production, the equipment used for handling and loading of the coal being secondary be-

cause it could quickly and easily be increased to meet the requirements.

See also—

West Virginia vs. R. R. Co., 134 Fed. Rep. 198, affirming 125 Fed. Rep. 252.
U. S. vs. N. & W. Ry. Co., 109 Fed. 183.

These cases invoked the remedial process of mandamus under Section 23 of the Act to Regulate Commerce, which was added to the act as an amendment in 1889, and while the legal sufficiency of this section was denied in the courts when attempt was made to employ its powers to enforce through routing, it was held effective as vesting in the courts authority to fix the percentage of cars which the shipper might have in times of car shortage.

West Virginia N. R. Co. vs. U. S., 134 Fed. Rep. 198.
U. S. vs. N. & W. Ry. Co., 143 Fed. Rep. 266.
Merchants Coal Co. vs. Fairmount Coal Co., 160 Fed. Rep. 769.

This remedy in the courts became subsequently defective because of the comprehensive amendments to the Act to Regulate Commerce enlarging the powers of the Interstate Commerce Commission. These amendments had for their purpose the curing of the remedial insufficiency of the act and thereby supplying an effective means for enforcing the orders of the Commission. The Supreme Court of the United States, in B. & O. R. R. Co. vs. U. S., ex rel., 215 U. S. 481, reversed the Circuit Court of Appeals (165 Fed. Rep. 113), and held that the process of mandamus provided for in the twenty-third section was no longer the proper remedy; that complaint must be made to the Commission and an investigation demanded. In this respect the Supreme Court of the United States has since consistently affirmed the powers of the Commission to

deal with and control, as an administrative question, the distribution of cars to shippers.

Under the original act, and the earlier amendments thereto, the Commission attempted to give effect to the apparent spirit of the legislation that the supplying of cars to shippers should be without undue discrimination or preference, but its orders were largely without effect in realizing the desired end. However, since these earlier cases in no wise reflect present-day conditions, it is not essential that we analyze these rulings.

Since the conditions in the various coal fields differed substantially from commercial, operating and transportation standpoints, it is important that we analyze the Commission's decisions establishing equitable coal mine ratings for the distribution of cars.

In the case of the Railroad Commission of Ohio, et al., vs. Hocking Valley Railroad Company, et al. (12 I. C. C. Rep. 398), the defendant carriers were engaged principally in the transportation of coal from mines located upon their own lines. Certain other railways purchased their fuel supply from coal operators owning mines upon the lines of these defendant carriers and sent their own cars upon the lines of the defendants consigned to the coal companies with which the railroad companies so sending their cars had contracts for fuel coal. Certain other coal operators upon the lines of the defendants' railroads had leased, or so-called "private cars," devoted exclusively to their own use. During a part of the year the defendant lines were unable to furnish all of the cars desired by coal operators along their lines, and at such times the available cars not specially consigned or restricted as to use were divided among the several coal companies according to the capacities of their several mines. But in such distribution the foreign railway fuel cars and the leased or "private

cars" were excluded from consideration, and were given to the coal companies to which they were consigned or assigned in addition to the full share of cars allotted to such mines in the proportionate distribution.

Upon complaint, alleging unjust discrimination and favoritism as against other coal operators along the lines of the defendants in that such distribution of cars and such failure to count the foreign railway fuel cars and the leased or private cars gives the coal operators to whom such cars are consigned and assigned unwarranted advantages over other operators in the mining and market of the coal, the Commission held that a carrier should give to the owner or lessee of private cars the use of such cars; and should also give to a coal company the foreign railway fuel cars consigned to it; but that such private and foreign railway fuel cars should, in the distribution of cars, be counted against the company to which delivered and such company should not be given, in addition to such delivery, a share of the system cars except when the number of private and foreign railway fuel cars so delivered to it is less than its distributive share of the available cars, including system cars, foreign railway fuel cars, and so-called private cars, in which event it should be given only such number of the system cars as are necessary, when added to the number of private and foreign railway fuel cars assigned to it, to make up its distributive share of the total available equipment, including system cars, foreign railway fuel cars and so-called private cars. In this case the basis of distribution of the system cars in general was not complained of as unreasonable or unfair.

In this connection see "Effect of Interstate Commerce Commission's Distribution Rules Upon Intrastate Shipments," this volume, Chap. XI, Sect. 9.

In Royal Coal & Coke Company, et al., vs. Southern

Railway Company (13 I. C. C. 440, 442), the system of car distribution under attack was as follows:

The tonnage of the cars for carrier's railway fuel supplied to the fuel contract mines was deducted from the rated capacities of such mines and the remainder was considered the rating of these mines on which they shared with purely commercial mines in the pro rata distribution of equipment available for commercial shipments. This plan, briefly stated, applied as follows:

Two mines, designated as A and B, were rated by the defendant carriers at a daily loading capacity of 100 cars each. On a given day there were but 100 cars available for both mines. Mine A loaded 50 of these cars as so-called "arbitrary," or "preferential," or "railway company fuel cars," for the defendant lines, while mine B loaded none. The said 50 cars were subtracted from mine A's original loading capacity of 100 cars daily, leaving the remaining available 50 cars for commercial loading to be divided between the two mines on the basis of the new rating of 50 cars daily capacity for mine A and 100 cars daily capacity for mine B, thereby giving to mine B 33⅓ cars and to mine A 16⅔ cars of the said 50 cars, which, added to the 50 cars loaded for company fuel gave mine A 66⅔ cars, and mine B 33⅓ cars out of the original 100 available cars.

The carriers' defense of this system of mine rating was that it was an attempt to distribute available equipment equitably among the mines upon the proportionate amount of their business which was strictly commercial. The economic character of this scheme of distribution is illustrated thus:

Let it be assumed that a mine has a daily capacity of 1,000 tons, or 25 cars averaging 40 tons each. Let it be further assumed that such a mine has a fuel contract with

the carrier upon whose line the mines are located and under which it is obliged to furnish a minimum of 400 tons, or 10 cars, per day.

The shipment of this coal for fuel purposes reduced the capacity of this mine for commercial shipments to 600 tons per day, instead of 1,000 tons, and it is given its pro rata share of equipment available for commercial shipments on this basis, and this system is applied to all of the fuel mines in the district.

The mines shipping railway fuel coal get a larger proportion of the total cars available, and because of this they enter into fuel contracts with the carriers at a price somewhat lower than the average market price of coal. As a result they secure greater steadiness of work for their miners, a larger total output, certainty of part of their income, and a chance to obtain at least a part of the commercial prices for its output after supplying the railway fuel coal. In this particular case there were no private or individual cars belonging in this coal district. The defendant carriers respected the billing of cars of other carriers which were sent to these mines for loading with coal for railroad fuel, counted them against the mines to which they were consigned as commercial cars, and did with these foreign railway fuel cars what the complainants contended they should do with respect to the defendants' own fuel cars.

This system of car distribution, it was charged, as affecting the ratings of the mines, produced a result unduly prejudicial and disadvantageous to the purely commercial mines in that they were progressively restricted in the allotment of cars.

Attention was called to the Pennsylvania Railroad Company's system of distribution made effective January 1, 1906, as follows:

"Cars for Pennsylvania Railroad fuel supply, foreign railroad cars specially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading—will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all other cars will be prorated."

The Commission referred to this rule in its report to Congress in response to the joint resolution of March 7, 1906, on the subject of railroad discriminations and monopolies in coal and oil, but did not approve the rule. It expressed the opinion that this rule would seem to abolish the assignment of cars on that road for its fuel supply and also for the fuel supply of other roads (foreign railway fuel). The same circular covered individual cars, but, stated the Commission, where the individual cars and the assigned cars exceed the rated capacity of a mine, this order would not relieve the unfair condition.

The Commission's holding in the Royal Coal Co. Case, *supra*, is comprehensive and interpretive of the basic principles of an equitable car distribution to coal mines:

"The defendant's plan of car distribution as affecting its rating of the mines produces a result unduly prejudicial and disadvantageous to the purely commercial mines in that they are progressively restricted in the allotment of cars. In view of the facts the question arises, What would be a reasonable and just plan of car distribution in cases of car shortage?

"This Commission, in its report to Congress in response to the joint resolution approved March 7, 1906, on the subject of railroad discriminations and monopolies in coal and oil, on page 68, referring to the section of country in

which the investigation had been made, discussed the question of car distribution generally and said:

" 'The prevailing rule is that cars in which fuel coal was loaded were not counted against the percentage of cars allotted to the operator furnishing such coal, but that fuel-coal cars were arbitrarily allotted to the operators furnishing such coal over and above their percentage allotment.

" 'The reason advanced by the officers of the railroad for this was that it enabled them to get cheaper fuel, in that an operator loading fuel coal would get the cars necessary to carry the same over and above the percentage he was entitled to under the system of car distribution in effect, and that he would therefore be willing to make a low price on fuel coal in order to keep his colliery running regularly. The result of this was practically a payment by the operator to the railroad company for cars by way of reducing the price of fuel coal, and while the profit of the operator on fuel coal may not be large, it enabled him to keep his miners regularly employed and his plant in operation and gave him an advantage over a competitor who has no order for fuel coal.

" 'This system of allotting cars for fuel coal and not charging the same as against the percentage of the operator receiving the same is unjust and unfair unless fuel coal is taken from all of the mines on the line of the road in the same proportion that cars are distributed.'

"Again, on page 80 of the report:

" 'Another source of discrimination in the system of car-distribution on the several railroads is the assignment of cars to certain operations for fuel coal or company coal without charging such cars against the pro rata distributive shares in the equipment of the road. In other words, treating such assigned cars as arbitrary cars and also treating cars from other roads for fuel cars as arbitrary

cars and not counting them against the percentage to which the operator receiving them is entitled. This method of distributing cars interferes with and to a certain extent nullifies any fair system of distribution which may be put into effect, creates inequalities and injustice as between shippers, and is frequently used by the railroad company to enable it to get its fuel supply at less than the market price for coal, and amounts to an arbitrary assignment of cars in consideration of the difference between the price the company has to pay for fuel coal and the market price thereof.'

"On page 81 of the report the Commission recommended:

" 'That after reasonable time carriers engaged in interstate commerce be prohibited from using "individual or private" cars for the handling of coal traffic; and further that when a carrier is unable to furnish all the cars required by all the shippers upon its line, all cars in service on the road be treated as the equipment of the company and subject to distribution according to the system or plan in effect at that time.'

"In the Circuit Court for the eastern district of Pennsylvania the Logan Coal Company, which owned 150 private or individual coal cars, filed a petition December 17, 1906, for a mandamus against the Pennsylvania Railroad Company to require the defendant to cease from subjecting the company to undue, unjust or unreasonable discrimination in the distribution of cars under the rule of the Pennsylvania Railroad quoted above. Answer was filed and the case was heard and decided by Holland, district judge, July 1, 1907, 154 Fed. Rep. 497. The Court said:

" 'The relator is not in any sense discriminated against. First, it has the use of its own cars and its share of

company cars upon a basis which gives it a certain advantage over its competitors, and in addition, it receives a certain compensation from the railroad company for its cars. They are placed upon the tracks of the defendant company and the engines and the train crews and the moving facilities of the company are taxed to transport these individual cars, and there is no reason that I can see why they should not be regarded in the distribution of cars to shippers as a part of the equipment, in order that the defendant company may be enabled to treat all shippers the same, and as near as may be at all times in the year furnish car facilities for the transportation of coal along its line upon a basis fixed upon the rated capacity of the mine as ascertained by the method adopted by the railway company.

" 'What has been said in regard to individual cars applies to the use of fuel cars, whether they be those of the defendant company or fuel cars of other corporations purchasing coal from the relator. They should be treated the same as individual cars in the distribution of available cars, and the defendant company in the treatment of these cars by the order of January 1, 1906, in no way that we can see unduly or unreasonably discriminated against the relator.'

"That case merely held that granting the rule to be as set forth in the petition, the relator, which owned individual cars, was far from being unduly discriminated against, or unduly prejudiced by said rule; in fact, had an advantage over its competitors, and that, therefore, the petition for mandamus should be dismissed. It does not approve the Pennsylvania Railroad Company's plan for distribution, but condemns it by saying:

" 'The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad

company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line upon a basis giving each equal facilities with the other.'

"This Commission did not endorse or commend the plan of the Pennsylvania Railroad Company, nor was that plan approved by Judge Holland in the Logan Coal Case.

"On January 16, 1907, the United States, ex rel. Pitcairn Coal Company, which owned no individual coal cars, filed a petition in the Circuit Court for the district of Maryland for a mandamus to require the Baltimore & Ohio Railroad Company, et al., to cease from subjecting the relator and other coal companies on the Monongah Division to undue and unreasonable discrimination in the shipping and transportation of coal. The case was decided by Morris, district judge, June 11, 1907, 154 Fed. Rep. 108. The relator had charged that whenever in any district the supply of cars was insufficient to fill all orders cars were supposed to be distributed, and the Baltimore & Ohio Railroad Company alleged that it had distributed such cars on a percentage basis to all the mines in such district, but in the distribution of cars on a percentage basis, before distribution was made, certain arbitrary assignments of cars were made, reducing the total number of cars to be distributed.

"In discussing this case the court said:

" 'The purchases of coal at the mines by the Baltimore & Ohio Railroad Company itself amount to about 5,000,000 tons a year; the consumption being greatest in the winter time, when the car shortage is most felt. This coal is delivered by the mines from which it is purchased directly onto the engines, tenders and company's cars, and does not pay freight, and does not enter into interstate com-

merce. It is consumed by the Baltimore & Ohio Railroad in operating its own lines. It is naturally purchased from the larger mines, having coal of the grade and price used, because they have the capacity to furnish daily the large quantity daily required by the railroad, but the coal so sold is not counted in the shipments on which the percentage rating is based.'

"This statement of facts in the Pitcairn case does not apply in these cases against the Southern Railway Company, because it is conceded that even the company's fuel supply bought at the mines in Tennessee is largely hauled to, stored, and used in the states of North and South Carolina; it does not enter into interstate commerce. Again, the Southern Railway Company does not count its own fuel coal in ascertaining the ratings of the various mines in the Coster Division, and even if defendants' own coal were not shipped to interstate points, its plan of car distribution would interfere with and affect interstate shipments of commercial coal.

"The Pitcairn case, like the Logan case, was a petition for mandamus, and was based upon a plan of car distribution, but these are the only points of similarity: the Pitcairn Company owned no individual cars, the Logan Company did; the Pitcairn Company was adjudged entitled to a peremptory writ requiring the Baltimore & Ohio Railroad Company, in cases of car shortage, in distributing the pro rata shares of the general coal car equipment of the railroad company according to the percentage to which each mine is entitled, to include in the available car supply as a basis of the calculation the individual cars of mine operators regularly used on the Baltimore & Ohio Railroad, not intending, however, to give to the relator, or those in like situation with him, in any event the use at

any time of individual cars to the exclusive use of which other mine operators are entitled.

"In the case of the Railroad Commission of Ohio, et al., vs. Hocking Valley Railway Company, et al., 12 I. C. C. Rep. 398, this Commission said:

" 'The total of the foreign railway fuel cars, the private cars, and the system cars should be taken into consideration in determining the distribution. If the number of foreign railway fuel cars or of private or leased cars is less than the percentage or proportion of the company to which such cars are consigned or assigned, that company should be given all of the foreign railway fuel cars consigned to it, and all of the private or leased cars belonging to it, and a sufficient number of system cars to make up its proportion. On the other hand, if the number of foreign railway fuel cars consigned to it and of private cars assigned to it is greater than its proportion, all such cars so consigned or assigned to it should be delivered to it and the available system cars should be divided among the other operators on the basis of a changed percentage because of the elimination of the company or companies to which the foreign railway fuel cars and private cars have been consigned, assigned or delivered.'

"The railroads must have fuel; they are entitled and indeed required by law to take all proper and just measures to assure the regularity and certainty of their fuel supply; but in securing such supply they are not justified either in beating down the price of coal by means of plans of car distribution or in penalizing mines that refuse to sell fuel coal by lowered mine ratings or lessened car supply.

"The carrier must be free to contract for the total output of a mine, if it so desires, or it may contract for any part of the mine's output less than the whole, and it is entitled to get its fuel coal first, for without fuel it can not

haul even commercial coal to its destination, to say nothing of complying with its obligations to the public at large; but in all its acts it must deal even-handed justice in the matter of car distribution as in the matter of rates. If a mine contracts to furnish only a part of its output to the railroad for fuel, and if the filling of its contract with the railroad calls for its full pro rata of cars, or more, then it should not receive other cars for commercial shipment. If such a mine in filling its contract to supply fuel coal to the railroads does not exhaust its equitable pro rata of cars, then cars should be given it for commercial shipments sufficient to complete its full pro rata share of all available cars.

"We are clearly of opinion that in the matter of car distribution, where there is an inadequate supply of coal cars, the only regulation or practice in respect to the transportation of coal from the mines that is just, fair and reasonable to be hereafter followed is to allot to each mine its fair and just proportion of the coal cars estimated upon its justly ascertained capacity and without regard as to whether the mine furnishes partly fuel coal and partly commercial coal, or commercial coal only."

In Traer vs. Chicago & Alton Railroad Company, et al., 13 I. C. C. Rep. 451, several of the defendants had contracts for their own fuel supply with certain of the mines located on their respective lines. Some of the mines had contracts to furnish foreign railways with coal and others had contracts with purchasers who furnish private cars for the transportation of such coal. The complainant sold its coal almost wholly in the open market, and each of its mines was dependent upon the defendant railway upon whose line it is located for cars to transport the output thereof. Complainant had no contracts for furnishing fuel coal to the defendants, and, except in a few instances, had

not used foreign railway fuel cars nor private cars during the period covered by the complaints.

In establishing a system of car distribution the defendant carriers had given the several mines located on their respective lines daily tonnage ratings, which ratings were not at issue in the controversy before the Commission. Under the system established each mine was entitled daily to such percentage of cars as its tonnage rating bore to the total number of cars available for distribution for commercial purposes. Defendants' fuel cars, foreign railway fuel cars and private cars were not charged against the distributive shares of the mines to which they were assigned. After the assignment of such cars to said mines, each was given the same percentage of the remaining cars available for distribution that day as if it had received no cars at all. This permits these mines to ship a greater portion of their daily output than mines having the same tonnage rating but that did not have fuel contracts with the defendant carriers, nor the use of private or foreign railway fuel cars.

The gravamen of the complaint in this case was that this plan of distribution gives to some mines more cars than they are entitled to under their several ratings, and unjustly discriminates against it and other mines and mine owners; that the increased allotment to such mines makes a corresponding decrease in the cars to which the complainant and the other mine owners would otherwise be entitled, and that their interstate shipments of coal are to the extent of that decrease thus restricted.

In this particular case the failure to count the defendant carriers' fuel cars against the mines to which they were delivered was not specified in the complaint against one of the defendants, the Illinois Central Railroad Company, but

in the briefs and on the argument of the case it was asserted that this question was of great importance to it.

At the time of the filing of the complaint before the Commission, the Circuit Court of the United States for the northern district of Illinois had enjoined the defendant from counting foreign railway fuel cars and private cars against the mines to which they were assigned. The question of the Commission's jurisdiction of discriminatory practices, in the light of the decision of the Supreme Court of the United States in Texas & Pacific Railway Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, was decided by it in Railroad Commission of Ohio vs. Hocking Valley Railway Company, *supra*. The ruling of the Commission in the Traer case is so comprehensive of the spirit and letter of the regulatory legislation that its findings are worthy of note at length:

"Defendants in their briefs concede that the prior holding of the Commission, in the Railroad Commission of Ohio vs. Hocking Valley Railway Company, *supra*, eliminates the question of counting private cars and foreign railway fuel cars in the distribution, and that the question of counting the cars used for the defendants' own fuel is really the only question presented for determination. Defendants claim that the right to make private contracts therefor, and that the failure to count against the mines the cars furnished for such fuel supply, permits them to make advantageous contracts and to get their coal at the lower price; that if they counted their own fuel cars in the distribution they would not only have to pay a higher price for their coal, but might not be able to contract for it at all.

"The Chicago & Alton Railroad Company has 360 hopper-bottomed gondola cars which it says are used solely for its own fuel, and which, because no shipper on its line

has trestle upon which to unload them, are not only inconvenient, but impracticable for commercial use.

"Complainant in these cases presents the following illustration, and argues that such a practice is unjustly discriminatory:

"A carrier offers to contract with two mines for 500 tons of coal per day, dividing the amount equally between them. The mines are each of 1,000 tons daily capacity. One mine accepts the contract, and the other does not, and in turn the carrier gives the remaining portion of the contract to the first mine. The carrier has thus offered to the two mines a market created by itself; one mine has accepted the market so offered and the other has not. This leaves one mine with 500 tons of coal sold in a special market and 500 tons to find a common market, and the other has 1,000 tons to find a common market. The handling of the 500 tons sold to the carrier by the contracting mine requires the equipment of the railroad. The carrier can furnish cars for but 1,000 tons. It says it must have 500 tons for its necessary use, and sends the cars for that amount to the contracting mine. This leaves available cars of 500 tons capacity, in the distribution of which it says that it will not count the 500 tons that have been given to the contracting mine, but that it will divide the remaining cars on the basis of 1,000 tons rating for each mine, thus permitting the contracting mine to dispose of three-fourths of its output and the other only one-fourth.

"The carrier says it is justified in doing this because the first mine has made a contract with it to furnish it coal, which it must, of necessity, have in order to operate, and as an inducement to such mine to make this contract it does not charge to that mine the number of cars necessary to handle the 500 tons sold to the carrier, and in further consideration permits said mine to enjoy the same propor-

tional share in the remaining cars available for distribution as if it had not sold any coal to the carrier.

"If two mines of equal daily capacity are located on the line of a carrier, and one sells its entire daily output locally and the other does not sell any locally, but its entire output must find some other market, it is clear that, although the capacities of the mines are the same, and each would be entitled to the same percentage of cars if they were both offering their output to the company, the one would not be entitled to a rating because it would tender no coal, and the other would be entitled to the equipment of the company for that day, and if it was sufficient to move its output, both mines would be on an equality, so far as the selling of their output is concerned, but if one mine sells one-half of its output locally and the other none at all, and the carrier has only enough cars to transport one-half of the combined output of the two, it would be unfair for the carrier to rate the mine selling one-half of its output locally at the same tonnage as the other mine and give to it one-half of the cars that it had on hand on a given day.

"If a carrier assigns to or uses for the transportation of its own fuel supply only such part of its equipment as is reasonably necessary therefor, it may be asked what difference can it make to the shippers along its line whether those cars go to the mine or mines owned by the carrier or to one or more mines with which the carrier has contracts for coal? The shipper who has no fuel contract answers this by saying that when one mine has such contract with carrier and is furnished cars under it without having its distributive share of cars for commercial shipments reduced thereby, such mine is given an advantage over its competitor that has no contract with the carrier, because it is enabled to work its mine more regularly and thus keep its property in more efficient condition—to retain

its employes and thus to operate more economically and to sell its output more advantageously in the commercial market. To this the carrier and the shipper who has fuel contract with the carrier retort:

"'You were given an opportunity to take a contract upon the same terms and declined to do so.'

"Products offered a carrier for shipment in a given locality are usually tendered because the volume produced is in excess of that consumed in the local market. The object of the transportation requested is to get the surplus to a market of consumption. It is the duty of the carrier, so far as it is in its power, to furnish the means of getting that output either from the mills or from the mines to the market.

"That it is the duty of a common carrier to furnish means of transportation and to furnish them alike for all that are similarly situated, the Commission has held:

> Richmond Elevator Co. vs. P. M. R. R. Co., 10 I. C. C. Rep. 629.
> Eaton vs. C. H. & D. Ry. Co., 11 I. C. C. Rep. 619.
> Railroad Commission of Ohio vs. H. V. Ry. Co., 12 I. C. C. Rep. 398.
> Powhatan Coal & Coke Co. vs. N. & W. Ry. Co., 13 I. C. C. Rep. 69.

"One industry may not be built up by granting to it transportation privileges which are denied to and which work an unreasonable disadvantage against another industry. All must bear their just proportion, according to circumstances and conditions, of any disadvantage that may arise from insufficiency of facilities resulting from causes which are beyond the carrier's control.

"It appears that the defendant, the Chicago & Alton Railroad Company, applied its system of car distribution and rating thereunder to three mines not located on its

lines, but which it reached through switching connections with other railways. Said defendant had no fuel contracts with them, but during the months of September, October, and November, 1907, it furnished cars to said mines under their respective rating for the transportation of approximately 130,000 tons of commercial coal. Defendant, the Illinois Central Railroad Company's line, does not reach complainant's mine at Litchfield, although it gives such mines a rating, it does not appear that it furnished cars to these mines.

"Unless for the purpose of securing its own fuel supply, it is neither right nor proper for a carrier to send its cars for loading at mines that are not located upon its line at times when it could only supply the demand for cars from mines that are located upon its line, perhaps wholly dependent upon it for both cars and transportation. Such a practice necessarily intensifies an existing inability on the part of the carrier to meet the demands of the shippers who are dependent upon it and who have a right to rely upon its performance of its duty as a common carrier, and it curtails the already restrictive opportunities of the mines that can secure neither cars nor transportation from any other carrier.

"The carrier owes a special duty to shippers who are entirely dependent upon it for transportation facilities. In fact, its first duty is to such shippers. See Memphis Freight Bureau vs. Ft. S. & W. R. R. Co., 13 I. C. C. Rep. 1. It may not be compelled to nor may it voluntarily divert its equipment from its own line to shippers on another line when to do so would deprive its local shippers of needed equipment. A carrier may, of course, send its equipment from its line for things that are necessary and essential for its own operation. This right arises from considerations of public policy which recognize the duty of

a carrier to operate its line, and the diverting of its equipment in that instance is predicated on necessity. It is not an inherent right that is grounded upon private contract. The limit of this right is measured by the extent of the necessity; it can not go beyond that.

"Fuel is as necessary and essential to the operation of a railroad as are rails, roadbed and other equipment. Without it a carrier could serve no one. The right of a carrier to own mines for its fuel supply is conceded in the law. The right of a carrier to contract for the purchase of its fuel supply with one mine or with a number of mines must be conceded, as must also the right to utilize its facilities in providing and transporting those materials and supplies that are essential to the operation of its line. In fact, a carrier must arrange in advance, by ownership or contract, for its fuel supply. Otherwise its ability to perform its functions would be as uncertain as its fuel supply. For that reason a carrier may contract for its fuel supply, and in so far as the contract is not opposed to public policy or in conflict with the statutes or the rules of law announced by the courts, it must be regarded as any other private contract. Any contract of lawful subject matter, regardless of the character of the parties, is made with reference to the law applicable thereto, and all principles of public policy involved therein, the statutes, and the decisions of the courts relating thereto become as effectually a part of the contract as if they had been expressly referred to therein. If a carrier and a mine owner make a contract for the fuel supply of the carrier which does violence to the Act to Regulate Commerce or to the decisions of the courts or is opposed to public policy, they are in no better position than the parties to any other contract which violates the legal principles relating thereto. A carrier cannot inject illegalities into such contract and have it upheld

on the ground of compelling necessity. Public policy has never permitted a carrier to procure its operating necessities by means of illegal contracts. The substance may be legally subject to contract, but the form of that contract must not be subject to illegal infirmities.

"A carrier may lawfully get the coal that it needs so long as it does not violate the rights of or fail in its duty to the public. It must make this contract as it must make all others, keeping in view its duty to perform its public functions and to avoid injury or damage to its shippers by reason of unjust discrimination, undue preference, or unreasonable disadvantage growing out of such contract or the performance thereof. If a contract for fuel covers such supply as the carrier reasonably needs for its operation, and a period of car shortage comes, it can use its equipment to procure its fuel even though it thereby deprives shippers along its line of desired use thereof. As before observed, however, this right to so use its cars rests not upon the ground of private contract, but upon the public necessity that it have fuel. But if a carrier had a contract for more cars of fuel per day than it needed, neither such contract, nor considerations of public policy which recognize the public necessity for fuel, would justify it during a period of car shortage in using its equipment for a superfluous supply when such equipment was demanded and needed by the shippers and the public.

"It should be borne in mind that this question of car distribution is of importance only during periods when the carrier is unable to furnish all the cars desired by shippers. Generally speaking, this inability so far as coal shipments are concerned prevails during about four or five months of the winter season, when the demand for coal is greatest and the prices of coal the highest. During the other por-

tion of the year carriers generally have a surplus of idle coal cars."

Traer vs. C. & A. R. R. Co., 13 I. C. C. Rep. 451, 454.

The Traer case was appealed to the Supreme Court of the United States and the basis of car distribution formulated by the Commission sustained and approved.

I. C. C. vs. I. C. R. Co. et al., 215 U. S. 452, 479.

The case of the Rail & River Coal Company vs. Baltimore & Ohio Railroad Company, 14 I. C. C. Rep. 86, presented no radical departure from the rule laid down in the Railroad Commission of Ohio case, *supra*, although consideration was given to two other factors affecting mine ratings—(1) physical capacity versus commercial capacity, and (2) the "pooling" of percentages for several mines by the same owner. Complaint was made against the defendant carrier's method of distributing "private cars" and "railway fuel cars," and the Commission, following the Railroad Commission of Ohio case, *supra*, held that the practice of the defendant in not charging private or individual cars against the percentages of the operators receiving them was unlawful, and that such operators were not entitled in the general distribution of available cars to receive their respective proportions of the system cars in addition to their private cars and assigned foreign railway fuel cars.

The Commission amplified its language in some of its former holdings: "The mere ownership of a private car gives to the owner no superior right to use the facilities of the carrier in transporting it; it gives to him no right to have his private car attached to a locomotive in preference to a system car loaded by another shipper. The ownership of a private car or the possession of a foreign

railway fuel car can give to an operator no preferred right to have it occupy a carrier's sidings or other tracks as against a system car loaded by another coal operator, or to have it handled by a train crew in preference to a system car. Whenever any of these general facilities are insufficient to move all the traffic offered, no operator has a superior right over another merely because he enjoys the advantage of owning private cars or has fuel contracts with connecting lines. And this shortage in other facilities, which, as heretofore stated, rarely, if ever, fails to accompany a shortage in cars, has an important bearing upon the matter of the distribution of cars, and underlies what the Commission has said on those questions in its formal decisions."

Speaking to the allegation in this case that cars were arbitrarily allotted to certain operators without regard to their percentage rating, urged by the complainant, the Commission said that "the right of a carrier to make such arbitrary allowances for the purpose of enabling the owner of a mine reasonably to develop it, so as to put it in a condition to operate and make shipments, has been recognized, and we see no grounds for disturbing the right in this case." And "a fixed rule governing the distribution of cars among various districts presents a difficult problem. But we do not regard it as a difficult matter to arrive at some method that will have due regard to transportation conditions and at the same time will produce reasonably equitable results."

In the Rail & River case, the matter most discussed upon the hearing was the method adopted by the defendant carrier in rating mines for the purpose of establishing the percentage of available car equipment to which they were respectively entitled in the daily distribution of cars during those periods when the demand for coal cars

exceeded the supply. "In this respect the basis of distribution long in force on the lines of the defendant differs from that adopted by other carriers whose methods for distributing cars have come before us upon formal complaint. In 1902 the defendant established a percentage basis consisting of two principal factors, (*a*) the physical capacity of the mine, and (*b*) the commercial capacity. The physical capacity is determined by the thickness of the coal seam, the number of rooms or working places, the capacity of the underground tram tracks, and the facilities for getting the coal out of the mine into the tipple, and from the tipple into the cars. A fixed per diem value is assigned to a man's labor, taking into consideration the character of the seam upon which the work is to be done; and the number of places in which a man can work is taken into account regardless of the number of men actually employed. This in substance is the method generally adopted in arriving at the physical capacity of mines. But the defendant takes into consideration also what is referred to in the record as the commercial capacity of the mine; that is to say, the actual requirements of a mine for cars as tested by actual shipments made by the mine. This factor is arrived at by taking the volume of shipments made by the mine during a period of free car supply, usually of four months and generally from April 1 to August 1 in each of the two preceding years. In figuring the actual shipments made by a mine during these two free car periods, all its shipments are included except the shipments of fuel coal to the defendant company. These three factors, namely, the physical capacity, the commercial capacity for the first year and the commercial capacity for the second year, are added together and divided by three. The result is the capacity basis for

determining the percentage of available cars that a particular mine is entitled to receive during percentage periods.

"This method of rating mines was adopted by the defendant in 1902, after a careful examination of the various systems in force on other lines. It was intended as a compromise between ratings based on physical capacity only and ratings based on commercial capacity only. The physical capacity basis is already well understood. The objection found by the defendant in that system was much like the defect condemned by the Commission in Powhatan Coal & Coke Co. vs. Norfolk & Western Ry. Co., 13 I. C. C. Rep. 69. In that case it appeared that the percentage rating of mines on the Norfolk & Western was based upon the number of coke ovens that had been erected by the respective operators. Many of the mines had erected coke ovens largely in excess of their requirements and solely for the purpose of increasing their percentages. The record showed that in the whole district but 52 per cent of the ovens that had been built were in actual operation. The ruling of the Commission was that the mere number of ovens erected by a particular mine did not fairly measure its relative rights in the distribution of cars. In an examination of the situation on its lines the defendant observed a like tendency. For the purpose of increasing their car percentage the operators were developing the physical capacity of their mines beyond their actual selling capacity. This was an economic waste for which the system adopted by the defendant was intended as a partial cure. Ratings based upon commercial capacity only are used on some lines and are built up on what is called the 'surprise' test. Without previous notice a carrier for three or four days will supply a mine with all the cars that it can use, and in this way a test is made of its actual requirements. The defect in this system was

that in some way the mine owner would learn that a test was about to be made and could thus prepare for it. The system in force on the lines of the defendant combines these two theories of distribution. By taking the physical capacity as one factor and as the other factor the commercial capacity, tested not during a period of three or four days only, but during the substantial period of four months in each of two years when cars are abundant and can be supplied in sufficient numbers to meet all the requirements of the mines, it was thought by the defendant that a more equitable distribution would result. Manifestly a mine having a small physical capacity, but which has secured large contracts, would prefer a system based on commercial capacity only. On the other hand, an operator of a mine having a large physical capacity, but which has no large contracts, would prefer a system based upon physical capacity only. In combining the two systems the defendant has adopted a middle ground, apparently upon the thought that neither the physical nor the commercial capacity is always a fair test. We are not prepared on this record to say that there is no force in that view, and that a system of mine rating based upon a combination of the physical and commercial capacities of the several mines does not more closely approximate the actual car requirements of the mines than a system based upon physical capacity only.

"But it is insisted by the complainant that the mine receiving foreign railway fuel cars and private cars during the free car periods is thereby able to increase its percentage rating as compared with the operator who receives no foreign fuel or private cars. It is urged that the operator who happens to have contracts for delivering coal during the free car periods, or whose sales are increased during those periods because of personal connec-

tions with coal dealers and consumers, is given an undue advantage when, in addition to the physical capacity, the actual shipments for the two preceding years are added for the purpose of arriving at his percentage basis; and that the method of rating mines by taking into consideration the previous shipments not only results in increasing the percentage of certain operators, but ultimately results in increasing the actual physical capacities of such mines. It may be that this is true. But is the defendant's system of car distribution on that account necessarily unlawful? It is not unlawful for coal operators to have contracts to supply connecting railway lines and private industries, and it does not follow because a large operator has large contracts that he is getting an undue or unlawful advantage under this system of car distribution over smaller operators in the same district. While the operator with large contracts may be able to keep his mine running more constantly and at a lower cost per ton, and may develop it more rapidly and thus in the progress of time be able to enlarge its percentage in the car distribution, nevertheless if that opportunity be open under the defendant's rules and regulations to all operators we do not clearly see on what ground the system must be condemned. Certainly the record does not advise us of any specific instances of discriminatory results to the smaller operators arising out of the defendant's system. The attack upon it is based largely upon the mere opinions of a few operators who testified that the system was unfair to operators having no contracts. As the record now stands the Commission is asked to hold, as a matter of law rather than as a fact demonstrated by actual experience, that the defendant's method of rating mines is unduly discriminatory, and that the only proper and lawful basis for the distribution

of coal cars among the mines of a coal district is their respective and relative physical capacities.

"Neither this record nor the records in other proceedings and investigations relating to coal-car distribution justify us in holding as a fixed rule of law that the physical capacity of the several coal mines in a given district is the only lawful factor upon which a system of car distribution may be built up, and that their actual requirements or commercial capacity may not lawfully be considered in the distribution. As at present advised the Commission is not in possession of sufficient information upon which to base such an announcement for general application. It seems to be rationally and logically a question of fact to be determined according to the circumstances and conditions existing in each particular case."

A very important case, involving car distribution, came before the Commission in 1910, known as the Hillsdale Coal & Coke Company vs. Pennsylvania Railroad Company, 19 I. C. C. Rep. 356, 362. In this case, "under a rule announced by it on February 1, 1903, the defendant seems to have charged all railroad cars, regardless of ownership, and private cars not owned by the operator loading them, against the distributive share of each mine, but it treated its own fuel cars as a special allotment in addition to the distributive share. On March 28, 1905, a notice was sent to shippers of bituminous coal from mines on the lines of the defendant advising them that thereafter all railroad cars, regardless of ownership, and all private cars not owned by the operator loading them, should be considered as available for distribution, except its own company fuel cars and fuel cars sent upon its lines by foreign companies and specially consigned to particular mines.

"On January 1, 1906, the defendant divided all cars into

two classes which it designated as 'assigned' and 'unassigned' cars. In the former class were its own fuel cars, foreign railway fuel cars, and individual or private cars loaded by their owners or assigned by their owners to particular mines. The rule then made effective and still in force provides that the capacity in tons of any 'assigned' cars shall be deducted from the rated capacity in tons of the particular mine receiving such cars, and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all 'unassigned' or system cars. This order or rule of the defendant was the occasion of some comment in the Logan Coal Company Case, *supra*. . . ." (In that case it will be recalled the court expressed a mathematical illustration of the effect of the relative ratings of the mines, and the Commission in the Hillsdale Case comments thereon.)

"The results arrived at by the court in its illustration seems to us not quite accurate, in that the total car capacity of 700 tons assumed by the court is made up of the company's system cars, and excludes from consideration the fact that one of the mines had on hand individual cars having a capacity of 200 tons, making a total available car capacity of 900 tons. Worked out on the basis of that total car tonnage the owner of the private cars would receive equipment enough to enable him to ship 463 tons and not 410 tons as stated by the court, while the mine depending upon system cars only would be able to ship 437 tons instead of 350 tons as stated by the court. The court used a car capacity of 70 per cent as the total available equipment for the output of both mines instead of a car capacity of 900 tons, or 90 per cent, which was actually on hand in the case assumed. In other words, the court absorbs in its illustration only 760 tons of the output of the two mines, while the facts assumed show that car

capacity of 900 tons was available. Under the Commission's rule each mine under these conditions would have been able to ship 450 tons.

"Using the same two mines with an assumed capacity of 500 tons each a day and available equipment with a total capacity of 70 per cent or 700 tons, including the individual cars with a capacity of 200 tons owned by one of the mines, the rule of distribution which this Commission has approved in Railroad Commission of Ohio vs. Hocking Valley Railroad Company and Traer vs. C. & A. R. R. Co., *supra,* would result in giving the latter mine its individual cars of 200 tons capacity, and system cars enough to absorb 150 additional tons, or a total of 350 tons, being one-half of the available equipment tonnage. The mine not owning the individual cars would get the other half of the available equipment tonnage, but all of it in system cars. Under the defendant's rule, on the other hand, the mine owning the individual cars would receive them, and would thereby be able to ship 200 tons of its total output capacity of 500 tons a day. The rating of this mine would then be reduced to 300 tons a day as against the rating of 500 tons assigned to the mine owning no private cars, the total reduced rating for the two mines being 800 tons. Instead of 700 tons the equipment remaining available for distribution would carry but 500 tons, of which the mine owning individual cars would get three-eights, or 188 tons, making its total tonnage 388 tons, while the other mine would get five-eighths, or system cars of a capacity of 312 tons, an advantage of 76 tons enjoyed by the mine owning private cars in the distribution of available equipment. That mine under the defendant's rule would, therefore, be able to ship out between 20 and 25 per cent more coal than its competitor, which, under the rule approved by the Commission, the shipments of

the two mines would be the same under the facts assumed by the court in the case cited. . . .

"Upon all the facts shown of record the Commission therefore finds that throughout the period of the action the system upon which the defendant distributed its available coal car equipment, including system fuel cars, foreign railway fuel cars and individual or private cars, has subjected the complainant to an undue and an unlawful discrimination. In this connection an important disclosure is made in a letter of record here, addressed to the president of the Clark Brothers Coal Mining Company, under date of March 6, 1907, by the general superintendent of coal transportation of the defendant company. It is there stated that the distribution of coal cars on the lines of the defendant on that date was as follows:

	Per Cent
System cars for company coal	21
Foreign cars for supply coal	6
Individual cars	45
System cars for commercial coal	25
Foreign cars for commercial coal	3
Total	100

"This condition of affairs emphasizes the inequity of a system of distribution that first deducts from the rated capacity of a mine the tonnage represented by the capacity of the cars specially assigned to it and then uses the remainder as a new basis for determining the proportion of unassigned cars that the mine is to have. The figures above given show that 72 per cent of all the cars available on the lines of the defendant on the date mentioned were assigned cars, and but 28 per cent were unassigned cars. Manifestly such a basis of distribution can have but one

tendency, and that is not only to steadily increase the physical capacity of the mines that regularly receive this large percentage of assigned cars, but also steadily to increase their commercial capacity, an advantage which the mines having the benefit of no assigned cars obviously can not enjoy. With such a large percentage of assigned cars, it cannot be doubted that the equipment furnished to some of these mines was sufficient to approximate their ratings, while the small percentage of unassigned cars makes it equally clear that the mines having no other cars must have fallen substantially short of their ratings.

"We further find that the continuance of that system of distribution for the future would be unlawful upon the same grounds. Although the mine owning private cars or to which company or foreign railway fuel cars are consigned is entitled to receive them even though in excess of their ratable proportion of all available coal-car equipment, nevertheless the defendant will be required in the future to count all such cars against the distributive share of the mine so receiving them. It is scarcely necessary to add that the complainant's second request for a finding and for an order requiring the defendant, during percentage periods, to distribute ratably among the operators, according to the actual output capacity of their mines, 'all cars adapted to and used for carrying bituminous coal,' whether company fuel cars, foreign railway fuel cars, or private cars, must be denied.

"In view of our finding herein that the practice of the defendant in not counting assigned cars against the ratings of the mines has been discriminatory and has resulted in injury to the complainants in this group of cases, it is suggested that it will not be fair nor equitable to content ourselves with a condemnation of that practice and the entry of an order requiring a different practice for the

future; such a course, it is said, will leave the complainants under the disadvantage that the practice has wrought in the past, of giving to the favored mine the results that have wrongfully accrued to them. In other words, it is said that, under rules here condemned, the preferred mines have been able year by year to enlarge their commercial output while the commercial output of the complainants and others has been restricted; and that justice requires that there shall be a new point of departure, at least for the present, based solely upon the respective physical capacities of the mines on the lines of the defendant. Exact justice is ordinarily not attainable. It is difficult no less for this Commission than for a court to deal with such a situation as this with mathematical accuracy. The most that either may hope to accomplish in such a state of facts is to do substantial justice; and this we do, so far as it seems to us possible, when we require the defendant to adjust its rules on a proper basis for the future, and give to the complainants the opportunity to have their injuries redressed in the form of damages. While the tendency of the prior rule must have been to enlarge the commercial capacity of the preferred mines, we can not doubt that their physical capacity has also been enlarged. And we have no assurance that an order requiring the defendant, for the present, as suggested, to distribute its cars on the basis solely of physical capacity would not, in some cases at least, work very substantial injustice. . . .

"The evidence shows that quite frequently, just how often not appearing, cars were placed at the mines of the petitioner too late to be loaded on that day, and one of the complaints made in the petition is that prior to January 1, 1906, the defendant charged such cars against the complainant's allotment not only for the day on which

they were so placed but also against its allotment for the following day. It is even said that the complainant's mines were charged with cars placed there during the night. At the time in question, whatever may now be the case, it was the custom of the miners to enter the mines at 8 A. M., and under the rules then in effect if cars were not on the siding ready for loading at that time, but were received later during the day, they would not be loaded until the next day. It does not appear just what the defendant's system was prior to January 1, 1906, with respect to the counting of cars placed at the mines for loading and not loaded until the following day. But the distribution sheets after that date contained a rule as follows:

"'A car placed too late for loading will not be counted as available for loading until the following day. A car available for loading and not loaded will be counted each day in column headed "empty cars over" until loaded or otherwise disposed of. A car loaded and not consigned will, unless consigned on the unloading day, be counted each day in column headed "unconsigned loads over" until consigned.'

"No claim is made upon the record that this rule, which seems still to be in effect, does not give fair results or that there is any discriminatory practice being carried on with respect to this phase of car distribution. So far as concerns the defendant's practice before that date, there seems to be no indication of any discrimination in this respect against the complainant in this or in the cases that follow it; nor is there any evidence that other mines were unduly favored in that regard."

The Commission did not dictate a basis for distribution in this case, and in its supplemental report in this same case (25 I. C. C. Rep. 186, 188) confined its findings solely

to the question of damages resulting from the practices and conditions formerly condemned.

The case of Jacoby vs. Pennsylvania R. R. Co., 19 I. C. C. Rep. 392, decided the same day as the Hillsdale Case, *supra,* followed the principle laid down in the latter case, and a special allotment daily of 500 of its system cars to a particular mine for the purpose of supplying foreign steamships with coal was declared to be a discriminatory practice on the part of the carrier so long as they were not counted against the rating of those mines during periods of car shortage, and a like view was taken by the Commission of the sale by the carrier of 1,000 of its coal cars to the same operator.

The facts in the Bulah Coal Company Case (Bulah Coal Company vs. P. R. R. Co., 20 I. C. C. Rep. 52) were not substantially dissimilar to the conditions and practices condemned in the Hillsdale Coal & Coke Company Case, *supra,* and the principles in the latter case were reaffirmed by the Commission.

The Missouri & Illinois Coal Company vs. Illinois Central Railroad Company, 22 I. C. C. Rep. 39, did not deal with mine ratings, but did involve the effect of an embargo rule enforced by the defendant carrier in order to retain on its lines sufficient cars to serve the mines.

In each of the foregoing cases the carrier's practices affecting mine ratings for car distribution were confined to mines located upon a single line of railway. In re Irregularities in Mine Ratings, 25 I. C. C. Rep. 286, 287, the controversy centered upon "junction-point" mines and an hourly-production basis. A "junction-point" mine is one located on and served by two or more carriers, and the "hourly-rating" system is a basis of daily capacity of the mine arrived at by taking the number of tons mined in a day and dividing this by the number of hours consumed

in producing such quantity to determine the hourly-capacity. The product of this hourly-capacity figure is then multiplied by the recognized number of working hours in a day to determine the daily rating of the mine. The report of the Commission in this case is elaborate in its detail, convincing in its analysis of the effect of the practices complained of, and its conclusions consistently in line with its former rulings upon this question.

"The principal underlying cause of this controversy is conflict of interests among the mine operators themselves. There are 168 coal mines on the Illinois Central, of which 114 are local to its lines, 45 are junction-point mines which have other railroad connections and 9 have outlet by river. These mines are spread over a territory 461 miles long and 226 miles wide in the states of Illinois, Indiana and Kentucky. Only 20 mines in the entire system average an annual loading of more than 10 cars per day and only one as much as 27 cars per day.

"The junction-point operators contend that their mines should be rated at their full capacity just as if they were not served by any carrier other than the Illinois Central, and regardless of the tonnage which they ship over other roads. The Illinois Central and the local mine operators contend that the basis of rating should be the actual shipments over the Illinois Central road.

"Beginning in 1907 the Illinois Central from time to time issued rules governing the rating of mines and distribution of cars which will be referred to in detail later. These rules were protested against by mine operators, and in 1910, on request of the parties, the Commission attempted informally to harmonize the differences. The operators as a whole then formed an association and agreed upon rules, which rules were adopted by the railroad company. Operating conditions on the Illinois Cen-

tral were greatly distributed and disorganized as a result of a strike among its employees and this resulted in dissatisfaction among the mine operators, which culminated in their abandoning all effort to agree upon a basis of ratings and the adoption of resolutions under which the entire responsibility was thrown upon the railroad company. The railroad promulgated new regulations which were even more unsatisfactory to the operators than those which were thus superseded. The old rules were returned to for the remainder of the season, and the Commission was requested to investigate the situation and decide the controversy.

"In 1907 Illinois Central Circular No. 70 gave the junction-point mine the same rating as though it were local to the Illinois Central. This basis was continued in Circular No. 77, issued July 1, 1908.

"In February, 1910, under Circular No. 85, the capacity basis of rating was continued, but reference to the junction-point mines as distinguished from local mines was omitted.

"In November, 1910, under Circular No. 88, the shipments made over the Illinois Central were for the first time made the basis of mine ratings. It is stated that this was done in conformity to what the Illinois Central believed to be the findings of the Commission in Hillsdale Coal & Coke Co. vs. P. R. R. Co., *supra*. This was the first circular in which the relationship of the junction-point mines and the local mines was defined. This adjustment was promptly opposed by the junction-point operators, who contended that the arrangement was unjustly discriminatory against them, and in that connection the informal efforts of the Commission previously referred to were invoked. Circular No. 89 was issued to remain

in effect until April 1, 1911, the end of the car-shortage period for that season.

"The representatives of the railroad and the operators having agreed upon a set of rules, they were promulgated in Circular No. 91. As stated, the operation of these regulations was seriously interfered with by a strike of railway employees, and in December, 1910, the operators withdrew from participation in an effort to agree upon rules and cast the entire responsibility upon the railroad.

"In February, 1912, in Circular No. 93, the rating of the mines was based upon the total shipments over the Illinois Central for the period between January 1 and September 30, 1911. The experiences of that period were increased by 50 per cent for the local mines and by 60 per cent for the junction-point mines, and their respective ratings were thus established.

"This rating was protested by certain operators and appeal was made to the Railroad & Warehouse Commission of Illinois, which commission ordered, as to state shipments, a return to the rules that were in effect on October 1, 1911, in Circular No. 91. Those rules were restored as to all shipments for the period ending April 1, 1912, the end of the car-shortage period for that season, and, as we understand, are now in force. Responsive to our invitation, the Illinois Commission was represented in the instant case.

"Officers of the Norfolk & Western and the Baltimore & Ohio Railroads testified as to the ratings on these roads. It appears, however, that on those systems the movement is reasonably steady throughout the year, while on the Illinois Central the winter shipments far exceed in volume those of the summer. There are comparatively few junction-point mines on the Baltimore & Ohio or the Norfolk

& Western. They make no distinction between the junction-point mine and the local mine.

"The difficulties of the winter of 1911-1912 on the Illinois Central were accentuated by the fact that the operators had furnished the railroad, as a basis of car distribution, ratings far in excess of the possibilities of shipment. No doubt the volume of shipments was restricted by the difficulties of operation and inability to get cars. It appears that the shipments were but 27 per cent of the ratings.

"The junction-point operators insist that the rating of a mine for a given month should be determined by dividing the total tonnage loaded and shipped during the previous month by the number of hours the mine was worked in that month, and multiplying that result by the number of hours in the standard working day; this rating to be revised monthly. The local operators, excepting those in the Kentucky field, favor the same hourly basis and monthly revision, but think that the tonnage considered should be only that shipped via the Illinois Central.

"The local operators in the Kentucky field urge a rating based upon the shipments over the Illinois Central for an extended period of time, excluding the time during which a mine is shut down for 15 or more consecutive days, and providing that if a mine secures a new contract extending over a period of four months or more, such additional tonnage will be added to the established rating.

"The operators of the mines which have outlet by river support the position of the junction-point operators.

"The Illinois Central contends for a rating based upon commercial capacity, as shown by shipments over the Illinois Central, with suitable allowance for increased demand in the winter season.

"The Illinois Central and some of the Kentucky opera-

tors say that in determining mine ratings the number of working days should be considered, while the remainder of the operators, both joint and local, insist that only the number of days or hours which the mine is actually worked should be considered. A mine may be idle for a substantial period, due to breakdown, accident, repairs or reconstruction, or for lack of orders. If a system of rating based upon daily production were adopted, it would perhaps be proper to take no cognizance of a few occasional idle days, but it would manifestly be improper in determining a mine's rating to include substantial periods of idleness.

"Under the hourly basis of rating, if a junction-point mine produces 1,200 tons, 800 of which are shipped over the Illinois Central and 400 over some other line, the 1,200 tons would be divided by the number of hours worked in producing it to determine the hourly capacity of the mine, and that hourly capacity would be multiplied by the recognized number of working hours in a day, 8 or 10, as the case may be, to determine the daily rating of the mine. If the mine were worked 8 hours in producing 1,200 tons, its hourly capacity would be 150 tons, which, multiplied by 8, the hours in a standard working day, would develop a daily capacity of 1,200 tons, which is the rating that should be given to it by the Illinois Central, according to the insistence of the junction-point operators.

"The Illinois Central and the local operators contend that only the tonnage shipped via the Illinois Central should be taken into consideration. Using the same example, the 800 tons shipped via the Illinois Central would be divided by the 8 hours which the mine was worked, developing an hourly capacity of 100 tons, or a daily capacity of 800 tons, which is the rating the Illinois Central would give it. It will be seen that the carrier and

the local operators would include in the computation the hours which the mine was worked in producing the tonnage shipped over some other road, while excluding the tonnage produced during those hours because it was not shipped over the Illinois Central.

"Practically all of the operators approve the hourly basis for determining the mine's capacity and rating, and the Illinois Central's principal witness stated that this system would be just as good as any other if the reports of production and hours worked were made in a way that would require accuracy. This is answered by showing that the operators post at the pit mouth each day a statement of the tonnage produced and the hours worked, upon which statement the pay of the employees is based. The operators announce a willingness to furnish the Illinois Central copies of such posted statements if they are desired. The Illinois Central objects somewhat to the hourly basis, because on a three days' test it was found that it could be manipulated. It argues that a rating based solely upon shipments over its road would, from the records of the mine and of the railroad, give an infallible check. It can hardly be said that a three days' test, at a time when no precautions against manipulation had been provided, is a fair test of the plan.

"In opposition to a rating based upon physical capacity the Illinois Central shows that if all the mines on its system were worked each day during the year and each produced its rated physical capacity, they would produce a total of 36,135,078 tons, but that all of the mines on the system loaded and shipped but 9,769,158 tons, or 27 per cent of their rated capacity. These figures were taken for the most recent twelve months' continuous period when both the railroad and the mines were free from strikes and attendant interruptions. There was during that

period a shortage of cars for but three months, the winter being unusually mild and the shipments lighter than normal. The tonnage produced by mines whose entire output is taken by the railroad for fuel was not included. It is suggested that these figures throw light upon the fact that the railroad is unable at times to furnish more than 35 or 40 per cent of the cars ordered. This showing demonstrates the incorrectness of the ratings that have been in force, but is by no means conclusive against any fair, equitable and non-discriminatory basis that may be established.

"It appears that the Illinois Central has not followed the custom of advising the operators each day as to the probable available car supply for the following day, as is done on other roads serving the same junction-point mines. The junction-point operators aver that if that information is furnished they will be able to, and will, order only such cars as they need for Illinois Central shipments, and that thus the probability of a junction-point mine ordering from the carriers that serve it a total number of cars in excess of its possible capacity will be avoided. The justness of this criticism is admitted, and steps have been taken to furnish that information.

"Each of the coal traffic officers of other roads, who testified in this proceeding, thinks that the system in force on his line is the correct one, and apparently those systems are generally satisfactory to the operators served by those lines. But the system is not the same on two or more of these roads. . . .

"In Interstate Commerce Commission vs. I. C. R. R. Co., 215 U. S. 452, it was held that a railroad's car supply may be legally sufficient and yet not sufficient to meet the demands of shippers in unforeseen contingencies,

fluctuations in the demand for transportation, or unavoidable absence of equipment off the line.

"If the carriers were to equip themselves with cars, motive power, tracks and terminals so as to meet at any moment the maximum demand for transportation, the shipping public would be obliged to pay interest upon that investment, and for the maintenance of those facilities. The question of the sufficiency of the Illinois Central equipment is, however, not in this case. What we are to determine is an equitable system of mine ratings upon which equitable distribution of the available equipment may be made when there is not sufficient to meet all demands.

"The Illinois Central argues that the method of rating mines on the basis of the coal hoisted per hour is a purely physical capacity basis just as much as one based upon the physical capacity of the mine, its equipment, the number of men employed, the thickness of the seam, etc. We do not agree with this suggestion. The one is a measure of the ability of the mine to hoist and load coal under conditions as they exist, the other is an ascertainment of the possible physical capacity if all of those possibilities were developed. It is true that a rating fixed upon the basis of the hours worked and the tonnage hoisted would give to the mine working but a few hours and producing a given number of tons per hour the same rating as to the mine which worked every day during the month and produced an average of the same number of tons per hour. The mine that worked but a few hours would get the rating, but it would not get cars thereunder unless it shipped the coal. A junction-point mine working 8 hours and producing 1,000 tons of coal, of which 500 tons are shipped via the Illinois Central and 500 tons via some

other road is certainly not worked 8 hours in producing the tonnage shipped over the Illinois Central.

"Under the Illinois Central plan the mines that have river outlet are rated as junction-point mines. If, during the season of open navigation such a mine shipped its entire output by water it would have made no shipments over the Illinois Central and therefore have no basis for rating for the winter, and when navigation closed it would be left without any means of transportation.

"Under the same plan, if a junction-point mine had a contract for its entire output via another line during the summer and that contract expired as winter approached and the mine was able to make a contract for the delivery of its output for succeeding months via the Illinois Central it would have no rating, and therefore would be denied the privilege of shipping over the Illinois Central. This seems to us as unfair as it would be to deny facilities of transportation to a mine in the winter season because it had been shut down in the summer.

"Again, a mine would have a rating based only upon its shipments via the Illinois Central; it would in a period of car shortage be unable to get the cars that it desired, and therefore its shipments via the Illinois Central would be still less. But such reduced shipments would be taken as the basis of revision of its ratings, inevitably leading to a constantly shrinking rating.

"If the Illinois Central had a 50 per cent car supply and the junction-point mine should run half a day and then shut down, its rating on the Illinois Central would not be impaired. If, however, it should run the remaining half day and ship that output over another road, its rating on the Illinois Central would be reduced one-half.

"If a local mine had a capacity of 500 tons daily, and during the period of full car supply which the Illinois

Central plan proposes to take as the basis of rating, it should ship a total of 50,000 tons, its daily rating, based upon the total number of working days in the full car supply period, would be 324 tons, and that would be its rating for the period of car shortage. If another local mine had a daily capacity of 3,000 tons, and during the same period of full car supply should ship the same aggregate amount, to-wit, 50,000 tons, it also, on the same basis, would have a daily rating for the car-shortage period of 324 tons. Thus the two mines, with respective daily capacities of 500 tons and 3,000 tons, would have the same ratings. . . .

"Here we have practically all of the operators agreed upon the desirability of the hourly production basis for ratings. The only objections that have been voiced against it by the railroad are, we think, fully met by the suggestions of the operators, hereinbefore noted.

"In approving this basis in this instance we do so only upon the facts and under the conditions here presented. We are not to be understood as indicating approval of its adoption in places where it would not suitably and properly meet the conditions, or where it would be objectionable to the great majority of those affected thereby.

"We think that under the circumstances of this case the junction-point mine and the mine that has river outlet are entitled to ratings by the Illinois Central the same as if they were not served by another carrier or outlet, and that the hourly basis contended for by the operators should be adopted by taking the total tonnage produced and shipped by the mine during the month and dividing it by the number of hours the mine is worked in producing it, and multiplying that quotient by the number of hours in the recognized working day, 8 or 10, as the case may

be, thus determining the daily rating of the mine. The ratings so determined should, in the same way, be revised monthly during the car-shortage period, and the rating had by a mine during the last month of the car-shortage period should be its rating for the first month of the next car-shortage period. Coal disposed of locally and not shipped should be excluded in computing the mine's rating. The operators should furnish the Illinois Central with copies of their daily statements of the hours worked and the tonnage produced, or, if that is not desired, should give the Illinois Central free access thereto. Cars left over empty or loaded and not billed should be counted against the distributive share of the mine the following day or days. The Illinois Central should furnish daily to the operators a statement of the probable available car supply for the following day.

"It is admitted that the junction-point mine enjoys advantages not possessed by the local mine, but it is stated that the coal lands of the junction-point mine cost twice as much as those available to but one road. Owners of junction-point mines have expended large sums in order to secure connections with more than one road. The junction-point mine has available a more extensive and more varied market for its coal. It may at times be able to dispose of its product upon the second line of railroad, while the mine local to the first road is unable to market its output. In case of car shortage the junction-point mine is able to select the outlet which affords the best and most liberal means of transportation. These are important advantages to which the junction-point mine is entitled and in the reasonable enjoyment of which it should be protected.

"The purpose of fixing a rating for a mine is to determine the basis upon which it shall share in the available

equipment when there is not sufficient to meet the demands of all the mines. If the carrier is unable to supply all of the equipment desired by the mines which it serves it becomes necessary to place some restriction upon all of them, and in order to do this impartially the practice of rating the mines and of distributing the available equipment pro rata on the basis of such ratings has been adopted. It is a practice in connection with the movement of interstate traffic which is within the jurisdiction of the Commission as to its reasonableness and its discriminatory effect, if any. It should, therefore, be viewed from every angle and in all of its details, with the purpose of ascertaining its ultimate effect. If unreasonableness or unjust discrimination are found, we have the power and it is our duty to correct the fault.

"The junction-point mine has a right to ship its output via either of the lines serving it. It may on any day tender its entire output to either of such lines and is entitled to its share of the available equipment on that basis. But it should not be permitted to tender its full capacity to each of two or more roads on the same day and thus obtain cars from each of the roads on the theory that it has ready for shipment via each road the total capacity of its mine.

"Having the right to assert its full capacity against the Illinois Central on any day, it follows that the junction-point must have a rating on the Illinois Central equal to its full capacity or it would not be able to secure its quota of available cars on the day when it elects to assert its full capacity against that line.

"Manifestly there ought to be uniformity in ratings and in the rules of car distribution to junction-point mines in a given territory. Reference to the mine rating rules of the principal carriers that serve the junction-point mines here considered shows that no two of them have the same

ratings or rules. No two of them treat the junction-point mines in the same way.

"If a junction-point mine of 3,000 tons capacity has contracted for the shipment of 2,000 tons per day over one of the lines serving it, it, of course, cannot ship more than 1,000 tons per day over the other line. If it is unable to secure from the first line cars for more than 1,000 tons, and still is able to produce 3,000 tons, it has 2,000 tons which it desires to ship over the second line. Should it, under those circumstances, be permitted to assert its full capacity of 3,000 tons against the second line and be given cars on that basis?

"In the annually recurring period of shortage of coal cars there is a great demand for coal, and, generally speaking, each mine, whether a junction-point or local, is able to sell all the coal it can mine and ship. If the junction-point mine, served by two lines, is permitted to assert its full capacity against each of those lines, it is able to secure 100 per cent of its needs whenever each of those lines has as much as a 50 per cent car supply. If it is served by three lines it would be able to secure 100 per cent of its needs when each of the lines had a 33⅓ per cent car supply. It would thus be able to work substantially full time, while the nearby local mine would be able to work only one-half or one-third time, and the result would be that miners and laborers would seek employment with the junction-point mine where they could work full time rather than with the local mine that was able to work but part of the time. This makes it impossible for the local mine owner to maintain an organization or to work his mine efficiently or economically, and imposes upon him an extra cost in the production of coal. . . .

"Each of the lines serving the junction-point mine would

be obliged to count against its distributive share all privately owned or specially consigned cars. It seems therefore that in order to avoid unjust discrimination in the distribution of cars some consideration must be given to the cars which the junction-point mine receives from another road. The junction-point mine having been accorded a rating equal to its full capacity, which protects its right to assert that full capacity against the Illinois Central on any day, it is necessary in order to avoid unjust discrimination in its favor as compared with the local mine to somewhat limit its power to assert that capacity against two or more carriers at the same time. This might perhaps be done by deducting from its rating capacity for purposes of distribution on that day the tonnage for which it is furnished cars by another carrier or other carriers, but if that is fair and reasonable as to one carrier it must be equally so as to the other carriers which serve the same mine, and the difficult question would be raised as to which of them should shrink its allotment because the other had furnished cars.

"It might be apportioned in alternate weeks or on alternate days if the mine operators were able to know from week to week or from day to day just what shipments they would desire to make over each road or what cars would be available. The difficulty is that in periods of car shortage the mine presumably has more orders than it can fill. It desires to fill some in preference to others and is obliged to regulate its shipments according to the cars furnished.

"It seems more practicable and reasonable to determine the distribution to the junction-point mine as compared to the local mine upon a percentage basis, which we think can be fairly fixed without ignoring or unjustly circum-

scribing the natural advantage or the rights of either the junction-point mine or the local mine.

"It would be unjustly discriminatory in favor of a junction-point mine and unduly prejudicial to the local mine for respondent to give the junction-point mine cars based upon its full capacity on days for which it ordered cars for part of its output from other roads. It would be unjustly discriminatory against the junction-point mine not to give reasonable recognition to its natural advantages of location. We think that on days for which it orders no cars from any other carrier, the junction-point mine should be given its pro rata of cars by the Illinois Central on the basis of its full rating; that on a day for which it orders cars from one other road, its rating on the Illinois Central for that day should be 75 per cent of its full rating; and that on a day for which it orders cars from two other roads its rating on the Illinois Central for that day should be 50 per cent of its full rating. Respondent's agents where the junction-point mines are located should ascertain from agents of other carriers serving the same mine as to its orders for cars from such other carriers, and see that this rule is observed."

Still another system of determining mine ratings for the distribution of coal car equipment was brought before the Commission in McCaa Coal Co. vs. Coal & Coke Railway Company, 30 I. C. C. Rep. 531, 532. In its decision the Commission said that "this case presents another of the perplexing car distribution situations, and it might be noted at the outset that this case will be discussed with a view of adjusting the particular situation in the particular locality in which it has arisen and that what may be said here in no wise affects the previous rulings of this Commission with respect to other car distribution situations in other localities. . . .

"In the instant case the system employed is practically the same as that in the Hillsdale Case, *supra,* except that if the resultant figure obtained is greater than the tipple or haulage capacity the lesser of these is taken as the basis of the mine rate. Fault could be found with that part of defendant's method of calculation in which it differs with that employed in the Hillsdale Case, because necessarily the tipple capacity is the maximum of a mine's physical capacity; a mine can not produce any more coal than can be passed over its tipple.

"It is the practice of the defendant to require the mines on its road to furnish quarterly, on blanks supplied by it, detailed information concerning the physical and operating conditions of the mine, such as the coal loaded during each of the months for the twelve months' period prior; average thickness of coal seam; number of working places available; number of mines working; number of miners that could be worked to advantage; average capacity of each miner; whether or not machines are used in mining; number of miners' houses occupied; haulage capacity, and tipple capacity.

"With this information before it the defendant disregards all of it except the reported number of working places; in each working place it imagines two miners working with a capacity per miner as reported, and with this calculation the physical capacity is determined. The working places reported which form so important a basis for this calculation may never have been worked, tracks may never have been laid into them, and it seems to be sufficient if they are simply marked out. Again, the working places reported may have been old working places that have been exhausted. Whether machines are used in the mine, a circumstance which would greatly increase the output for the number of men, seems not to enter into

consideration, nor the thickness of the seam of coal, nor the number of men who could be housed. Yet each of these conditions bears directly and necessarily upon the physical possibilities of the mine.

"The justification for this curtailed calculation by the defendant is that the same calculation is made for each mine, and made in the same way, and therefore everybody being treated alike there is no discrimination. But two wrongs or several wrongs never made a right, and the evil of this method of calculation is best shown by the following table compiled from defendant's rate sheet No. 5:

Coal & Coke Railway Company rating No. 5, effective Feb. 1, 1912.

Name of mine.	Commercial capacity.			Physical capacity.		Capacity.	Haulage capacity.	Tipple capacity.	Mine rate.
	Shipments for 12 months.	Average 300 working days.	Total working places.	Number of men can be worked.	Tons per man per day.				
Jenkins Coal & Coke Co.	9,940	33	42	84	10	840	(1)	1,000	437
Brady Coal Co.	17,834	59	75	150	10	1,500	600	600	600
W. H. Green	15,743	53	32	64	10	640	400	800	346
Davis Colliery Co. No. 1 (Coalton)	105,992	353	240	480	10	4,800	4,000	4,000	2,577
Davis Colliery Co. No. 2 (Sivad)	35,383	118	140	280	10	2,800	2,000	2,000	1,459
Adrian	.....	16	104	208	6	1,248	1,200	1,500	632
Gilmer Fuel Co.	49,423	165	120	240	8	1,920	.....	.....	1,043
Copen Creek Coal Co.	2,363	7	10	20	8	160	200	500	84
Davis Colliery No. 10 (Bower)	145,634	486	172	344	8	2,752	2,000	4,000	1,619
Davis Colliery No. 11 (Copen)	40,776	136	74	148	8	1,184	600	600	600
Braxton Coal & Coke Co.	2,042	7	12	24	7	168	300	400	88
Widen mine (B. C. & G. R. R.)	67,352	385	86	172	10	1,720	3,000	2,600	1,500
Elk Manor Coal Co.	46,748	156	82	164	8	1,312	1,000	800	734
Clay Coal Co.	20,004	67	108	216	5	1,080	300	900	300
Queen Shoals No. 1	27,185	91	18	36	6	216	200	250	219
Queen Shoals No. 2	.....	.....	11	22	6	132	.....	250	
Turner, mine (Steele & Payne Co.)	26,705	89	76	152	8	1,216	600	750	653
Pen Mar mine	4,512	15	15	30	6	180	.....	300	98
Peacock mine	2,194	7	14	28	6	168	.....	400	88
Total	.....	2,243	.....	.....	.....	.....	.....	.....	13,077

[1] Unlimited capacity.

[2] 7 months.

NOTE.—It should be noted that the physical capacity of each of the Davis mines is rated above its tipple or haulage capacity, and that in some of the calculations for physical capacity 8 tons per man and in others 10 tons per man and in some as low as 6 tons per man is taken as the capacity per miner per day.

"The best that can be said for these calculations as to physical capacity is that they are arbitrary inflations, which furnish nothing real or tangible, yet form the largest determinative factor in the mine rate. The larger this imaginary figure can be made the larger, of course, will be that mine's rating, no matter what its actual performances are or what they have been in the past or what they are likely to be in the immediate future. The larger the mine rate the greater percentage of available cars will be its share during the car shortage periods. If this imaginary figure can be inflated enough, it can be so manipulated that one mine will have sufficient cars to handle all its output, even during car-shortage periods, when competitive mines are being handicapped for lack of cars because their percentage or mine rate is so much lower in proportion to output.

"These physical capacity figures for the Davis mines seem to have been purposely inflated, and, to keep in line, many of the independent mines do the same thing, until the daily percentage of cars assignable to a single mine is much in excess of that mine's ability to load if its full allotment should be furnished to it on successive days. And it appears that in most cases about 30 per cent of a mine's present rating would supply that mine with all the cars it could load in a day's run. There are a number of rules incident to car distribution which have been prescribed by the defendant; two are in effect as follows: The entire allotment of cars must be ordered if any cars are wanted, and enough cars will be supplied where possible to make at least a day's run for the mine. Applying these two rules under the inflated allotment, the defendant has so supplied cars to the independent mines that these mines have more cars dumped on them in one day than they can possibly load, with the result that those not loaded

go over to penalize them on the next day's supply and are put against their full allotment for that day, the remainder of the full allotment, however, being furnished, so that by reason of penalties the mine's allotment for the month is exhausted in a few days, and the mine remains idle for the balance of the month. On the other hand, in supplying the Sivad, a Davis mine, during the same period, with a commercial capacity of 150 tons per day, or an equivalent of 3½ cars, having an allotment, however, under the defendant's method of 28 cars per day, the largest number of cars furnished this mine in any one day in September, 1912, was 8 cars, and no cars were furnished the following day; on three days 7 cars were furnished; on two days following those on which the 7 cars were furnished 2 cars and 3 cars were furnished and the mine loaded out. On two other days 6 cars were furnished; on the other days 5 cars or less were furnished, so that, for example, in October, 1912, out of 27 working days the Davis mine average 2¾ days, whereas those of the complainants averaged only 7.9 days. In November, 1912, the Davis mines averaged 20¾ days and the complainants 9 7/10 days. The cars seem to have been so supplied to the Davis mines that they could run regularly. The importance of this is that when a mine cannot operate regularly the miners leave and go to the mines that can operate regularly, thus paralyzing the inactive mines for the balance of the car-shortage period.

"It appears further that the miners insist on beginning work at seven o'clock in the morning; it is therefore necessary that cars must be ready to be loaded at that time or a day's run cannot be made. It appears that defendant makes a practice of furnishing the Davis mines with their cars before seven o'clock of the days ordered, while with the complainants deliveries are made late in the afternoon

frequently, with the result that the mines can not be worked until the following day.

"From the results thus obtained under the system of car distribution employed by the defendant, as above indicated, it seems that it must have been devised and prosecuted with a view to furnishing the mines which are owned by the same interest as the defendant railroad all the cars required during periods of car-shortage, and high prices. The discrimination permitted by this system, as indicated, is of the insidious character calling for drastic action by this Commission.

"In view of all the facts appearing in this case, it is our opinion and finding that the distribution of coal cars based upon the element of physical capacity is wholly unsatisfactory and works injustice. The best basis for the distribution of cars in this case is the proportionate necessities of the mines, as indicated by past performances, extending over periods of car-shortage as well as periods of free distribution. No basis of distribution can be absolutely precise. It is not necessary, however, to imagine anything or to deal in speculations or possibilities. The total shipments of each mine, taken for the two year period prior to January 1, 1913, divided by the number of ten-hour days the mine actually operated during such period furnishes the actual average daily output over a two-year period during car shortage as well as during free car supply. Such a basis will not permit speculation, but will reflect the operations and possibilities of each mine as truly as they can be ascertained, and such shall be the basis hereafter. This basis may be readjusted quarterly on reports to the defendant as now made, which shall also include information of the actual performance of each mine as herein indicated. Also, cars must be supplied to all operators as of 7 A. M. of the day charged. Where

the mine's percentage is not high enough to entitle it to one car in the distribution for the day, its order shall go over to the next day, and such mine shall be supplied before any other on the next day's distribution. In the case of a new mine, or a mine that did not operate during the period above described, an arbitrary allotment shall be made upon request, which shall bear due relation to other operating mines of similar proportions. It is recommended that the defendant continue to require the mines to report quarterly, as now, concerning their operations, and the mine operators are cautioned that these reports hereafter must not be padded. By reason of the financial and personal relation existing between the defendant company and the Davis Colliery Company, in complying with the views expressed herein the strictest impartiality will be required. In the first instance it will be left to the defendant to make effective the suggestions incorporated herein. If this is not done prior to August 1, 1914, upon complainants bringing the matter to the attention of the Commission, appropriate order will be entered.

"The basis of distribution herein prescribed will reduce the annual periods of car-shortage and consequent percentage periods. The total tonnage basis under the present system is very much inflated and the resultant car requirements much more extended than the actual demand warrants. The tonnage basis will be greatly reduced and will be more in accord with actual car requirements and the period of car shortage will be correspondingly reduced.

"The peculiar situation presented by the fact that the Coalton mine cokes a large portion of its output is also solved by the adoption of the basis of distribution indicated here. The Coalton mine cokes about 625 tons of its output of coal per day and shipped, as indicated in the table

above, an average of 353 tons a day, with an indicated physical capacity of 4,800 tons. The point was made that this mine was entitled to have its whole physical capacity taken into consideration in its allotment, although it usually coked most of its output. Such a consideration of physical capacity gives this mine an unwarranted advantage."

This car distribution basis was again brought before the Commission is a supplemental hearing (33 I. C. C. Rep. 128, 130), and the Commission condemned an attempted "pool" of the Davis mines in order to inflate their allotments. "Two further matters were presented, namely, the propriety of grouping the mines of the Davis Colliery Company in the distribution of coal cars, and allotting to one of the four mines of this company the entire percentage of cars due all of them on that day; and whether or not a mining company, in its allotment of cars during periods of car shortage should be penalized for cars which are partially loaded with the different grades of coal and remain over on succeeding days to be fully loaded from the grading tipple.

"It appears that the Davis Colliery Company operates four separate and distinct mining properties in this locality which have no connection with one another, except that they are operated under joint management and control. These properties are located at Copen, Bower, R. C. Junction and Coalton. Bower is 1.8 miles from Copen, and the property at this point is located about one mile from the main line. R. C. Junction is 60.3 miles beyond Bower. The mining property at this point is located about one mile from the main line. Coalton is 4.3 miles from R. C. Junction. It is plain that these four properties are separate and distinct operating units. They are not different openings of the same mining operation. They

stand in the same position, physically, as if they were four separately owned coal mining properties. The contention of the Davis Colliery Company is based upon the following language used in Rail & River Coal Company vs. B. & O. R. R. Co., 14 I. C. C. Rep. 86, 97:

"'Finally complaint is made of what is called "pooled percentages." The defendant permits the car percentages of several mines controlled or operated by one company to be grouped or pooled upon one or more of the mines; that is to say, if a company owning and operating four openings is entitled in the daily distribution to 25 cars for each mine, it may group or pool all these cars or any portion of them at one mine instead of using them at each mine in accordance with their respective percentages. This practice is complained of as an unjust discrimination on the ground that it permits a mining company rapidly to develop one mine after another and thereby to increase the percentage ratings of the several mines; and also that it enables a mining company to operate one or more of its several mines to a larger daily capacity and thereby reduces the cost per ton of the coal produced. Here also the record is lacking in sufficient facts and leaves us to a consideration of this complaint as a hypothetical one and as a question of law. Without committing ourselves at this time to any final opinion on the question, it will suffice to say that no sufficient showing has been made to enable us to say that this practice is unlawful and results in undue and unlawful discrimination.'

"From the qualified statement made in this citation, it is plain that the finding in that case was made upon the particular facts, or, rather, the lack of facts, in that particular case. It should be noted that the situation presented in the cited case was one where there were several 'openings,' and it seemed that the rating of the mine was based

on a scale of so many cars to each opening. The implication is that all openings were a part of the same operation.

"The contention of the Davis Colliery Company would result in the absurdity that if this company owned and operated mines in different parts of the country far removed from one another, but all served by the same railroad system, it could pool at its convenience the allotments of its several properties in the country and have them applied to a particular mine in a particular part of the country. The discrimination incident to such a system of distribution is too manifest to require further discussion.

"Each of these properties should be treated as a separate and distinct mining company for the purpose of distribution of cars, and if any of the four mines countermand its order for cars on any particular day during a period of car shortage its allotment shall go back into the general supply of cars and be distributed among all the other mines located on defendant's line, according to their respective ratings.

"It appears that some of the operators in the locality here involved shipped different grades of coal from the tipple. These different grades are prepared by screening over the tipple, and two or three cars are placed under the tipple, according to the number of grades that are being prepared, and each grade is loaded directly into its car. It often happens that not enough of a given grade of coal is mined in one day to load a full car of that particular grade, and the car must be held over to the succeeding day to complete the loading. These operators contend that such partially loaded cars should not be charged against them as penalties in the next day's allotment.

"In support thereof the practice on other lines was testified to, from which it appears that a custom is in vogue

on certain other lines of allowing the coal operators to bill out these partially loaded cars as if they had been loaded and taken from the mine yards of the railroad company. These cars, though billed out, are never actually moved by the railroad until loaded. When billed out, however, no penalty is assessed on them from day to day. This practice led to so many abuses that the railroads had to employ inspectors, provided with railroad bicycles to check up the reports as to the number of partially loaded cars so held. It often results that many empty cars on the side tracks of the mining companies are reported as partially loaded and billed out.

"It is manifest that such abuses discredit the practice. There can be no real difference in this respect between a partially loaded car and an empty car, except that the former becomes a convenience for storage purposes. An empty car held over from one day to the next would count as a penalty on the next day's allotment. No good reason appears for changing this rule with respect to partially loaded cars."

See also in this connection—

Vulcan Coal & Mining Company vs. Illinois Central Railroad Company, 33 I. C. C. Rep. 52, 68.

Pennsylvania Paraffine Works vs. Pennsylvania Railroad Co., 34 I. C. C. Rep. 179.

See also—

"Damages Arising out of Violations of the Act to Regulate Commerce" ("Interstate Commerce Law," Part 2), Chap. XXV, Sect. 9-(6).

The foregoing review of the Commission's rulings in coal car distribution investigations is essentially important because of the Commission's adherence to the rule that the basis of coal car allotment to mines must be established to meet the requirements and conditions of each individual

coal field, and that the rating of coal mines cannot reflect more than relative justice in the furnishing of coal car equipment during periods of car shortage. A close anlysis of these decisions shows recognition on the part of the Commission of different systems or methods of determining the proper rating of a mine, and in each case the significant fact appears that the regulating authority sought to adjust the local basis of distribution to afford equality in treatment of the different mines in the allotment of coal car equipment.

The different systems of rating mines may be distinguished as follows.

(a) Physical Capacity Less Railway Fuel Coal;
(b) Commercial Capacity Plus Physical Capacity;
(c) Mine Capacity versus Shipments;
(d) Hourly Basis (Idle Hour System); and
(e) Coke Oven Basis.

(1) Physical Capacity Less Railway Fuel Coal. The Commission has recognized the "special purposes" for which foreign railway fuel cars are consigned to a mine and does not, in its approval of the basis of car distribution, divert these cars to other than their intended use, but it requires that they shall be counted against the daily allotment of a mine to which they are assigned. It treats likewise the "private" cars of mine operators, but demands that such private cars shall, in the distribution of cars, be counted against the mine to which they are delivered and that such mine shall not get, in addition to such foreign railway fuel cars and private cars, a share of the system cars except when the number of foreign railway fuel cars and so-called private cars so delivered to the mine is less than the mine's distributive share of the available cars, which "available cars" shall include system cars, foreign

railway fuel cars and private cars, in which event the mine should be given only so many of the system cars as are necessary, when added to the number of private and foreign railway fuel cars assigned to that mine, to make up its distributive share of the total available equipment inclusive of the system, foreign railway fuel and private cars.

Thus, the mine which has railway fuel contracts is dealt "even-handed justice" in the distribution of cars, for if such a mine, in filling its contract to supply fuel coal, does not exhaust its equitable pro rata of cars, then cars should be given it for commercial shipments sufficient to complete its full pro rata share of all available cars, such "available cars" to consist of foreign railway fuel cars, private cars, and system cars.

Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. Rep. 356, 360.
Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. Rep. 86, 95.
Royal Coal & Coke Co. vs. So. Ry. Co., 13 I. C. C. Rep. 440, 444, 448.
Traer vs. C. & A. R. R. Co., 13 I. C. C. Rep. 451, 456.
Railroad Commission of Ohio vs. H. V. R. R. Co., 12 I. C. C. Rep. 398, 404.

Se also—

Coal & Oil Investigation, 31 I. C. C. Rep. 193, 217, 218, 219, 220, 221, 222, 223, 224.
In re Irregularities in Mine Ratings, 25 I. C. C. Rep. 286.

(2) **Commercial Capacity Plus Physical Capacity.** The Commission found that a system of coal car distribution which added to the physical capacity of the mine its commercial capacity for a substantial period and divides the sum by two, with the mine ratings revised at regular intervals, thus following up as closely as possible the fluctuations in the market, labor conditions, and car supply, was

not unfair or unduly discriminatory provided such system is equitably applied to all mines in the district.

Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. Rep. 356, 360, 361.
Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. Rep. 86, 95.

(3) Mine Capacity versus Shipments. The Commission approved the right of a carrier to make an arbitrary allowance for the purpose of enabling the owner of a mine reasonably to develop it so as to put it in condition to operate and make shipments, but cautioned the carrier that the circumstances and conditions must justify such special allowance.

The federal court in a prior case held, where the mine's percentage was based on capacity of the mine and previous shipments—the capacity being allowed to count as 1 and the shipments as 2—that the system was improper and unfair to an operator opening up a new mine, and that the new mine's percentage should be based solely upon the physical capacity of the mine.

Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. Rep. 86, 93.
U. S. vs. B. & O. R. R. Co., 165 Fed. Rep. 113, 130.

(4) Hourly Basis. The Commission held that junction-point mines and mines having river outlet should be rated by one carrier as if they were not served by another carrier or outlet. The allotment should be based upon the hourly method contended for by the operators, by taking the total tonnage produced and shipped by the mine during the month and dividing it by the number of hours the mine is worked in producing it, and multiplying that quotient by the number of hours in the recognized working-day. Such ratings so determined should be revised monthly during

the car-shortage period and the rating had by the mine during the last month of the car-shortage period should be its rating for the first month of the next car-shortage period. Coal disposed of locally and not shipped should be included in computing the mine's rating and cars left over empty or loaded and not billed must be counted against the distributive share of the mine the following day or days.

In this instance the Commission had to deal with mines served by two or more railroads or having a water outlet in addition to their rail service, and it laid down the rule that the junction-point mine has a right to ship its output via either of the lines serving it and may on any day tender its entire output to either of such lines and is entitled to its share of the available equipment on that day, but that such mine is not entitled to tender its full capacity to each of two or more lines on the same day and thus obtain cars from each of the carriers on the theory that it had ready for shipment via each road the total capacity of the mine.

The method of rating a mine on the basis of the coal hoisted per hour is not purely a physical basis, as is one based on the physical capacity of the mine, equipment, number of men, thickness of the seam, etc. The former basis is the measure of the mine's ability to hoist coal and load it under conditions as they exist at the instant moment, while the latter method is a determination of the possible physical capacity of the mine if all possibilities were developed.

In re Irregularities in Mine Ratings, 25 I. C. C. Rep. 286, 289, 293.

In this same connection the Commission held that if a system of mine ratings for the distribution of coal car equipment, based on daily production of the mine only, was

adopted, it would be manifestly improper, in determining the mine's rating, to include substantial periods of idleness. Thus, in a system of rating mines for car distribution known as the "idle-hour" basis, the number of days and hours a mine is in actual operation is used in determining its commercial capacity, instead of using the calendar days of the general period of production.

Colorado Coal Traffic Assn. vs. D. & R. G. R. R. Co., 23 I. C. C. Rep. 458, 462, 463, 464.

See also:

In re Irregularities in Mine Ratings, 25 I. C. C. Rep. 286, 289, 293.

(5) Coke Oven Basis. See "Car Distribution to Coke Ovens," this volume, Chap. IX, Sect. 1.

CHAPTER IX.

CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1. Car Distribution to Coke Ovens.

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CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1. Car Distribution to Coke-Ovens.

In Powhatan Coal & Coke Company vs. N. & W. Ry. Co. et al., 13 I. C. C. Rep. 69, 71, complaint was made to the Commission that the method of car distribution known as the "coke-oven basis," adopted and enforced by the defendant railway in the Pocahontas Flat Top coal district, in West Virginia, and Virginia, was unjustly discriminatory against the complainant, and operated to the undue preference and advantage of other mine operators in the district, in two particulars:

"1. Because the basis itself was essentially inequitable in that it placed an arbitrary limit upon the amount of coal the complainant might ship; and

"2. Because the "coke-oven basis" was not equitably applied and was disregarded in the apportionment of available cars to certain operators in the district.

"The Pocahontas Flat Top coal district is situated in the counties of McDowell and Mercer, in West Virginia, and in Tazewell County, in Virginia, comprising a territory about 25 miles long and 5 miles wide. Its annual production is around 6,000,000 tons. The Norfolk & Western Railway, the principal defendant in the case, is the only carrier by rail which enters the Pocahontas district. Mining conditions are substantially uniform throughout the

entire district, with the exception of certain advantages possessed by operators of thick beds of coal as compared with operators of thin beds.

"The theory of the 'coke-oven basis' of distribution is that the available supply of coal cars shall be distributed to mine operators in proportion to the number of coke-ovens erected by each operator. That is to say, the number of ovens erected by any individual operation divided by the total number of coke-ovens in the district will give the percentage of the available car supply to which such operation is at any time entitled. There are important exceptions made in the application of this basis of distribution, which will be noted in due course.

"The adoption of this method of car distribution seems to have been the result of a tripartite agreement between the railroad company, the land companies, and the lessee-operators. While it is difficult to ascertain the exact date when this method of distribution was first put in force, it is clear from the record that it has been in existence since 1889. Its adoption is due both to the quality of the coal produced in this district, and to the fact that practically all of the mine operators, being lessees of the land companies, were required by their lessors to build a definite number of coke-ovens to 100 acres of coal land.

"The Pocahontas coal is a soft coal, and when this field was opened it was believed to be good business policy to require the coal to be screened and the slack manufactured into coke, the expected result being that the operator, instead of having for sale merely the inferior "run-of-mine" coal, would produce both good coal and good coke. By this means the land-owners would increase their royalties, the railroad company its freights, and the mine operators their products. A further consideration leading to this agreement was the belief held at the time by the railway

company and the landowners that the Pocahontas field would become a great iron-ore producing district. To facilitate the output of this mineral wealth it was desirable and necessary to produce coke in the same field. Therefore, the landowners required their lessees to construct from ten to twenty coke-ovens per 100 acres of land leased.

"An agreement, entitled 'Coal Producers' Contract,' entered into August 11, 1886, by and between the railway company and certain landlord companies then in the Pocahontas field, provided, inter alia, as follows:

" 'The parties hereto agree that during the existence of this contract they will make no leases or sales of land or mining rights for coal operations until special arrangements have been made with the railroad company for such additional equipment as may be needed, and upon the express condition that the purchaser, lessee, or sub-lessee, shall become a party to this agreement.'

"The contract was to become effective January 1, 1887, and continue in force until December 31, 1896. The record does not disclose that the railway company, by any formal instrument, bound itself to provide 1½ coal cars for each coke-oven constructed, but letters signed by its president appear to show the intention of the railway company during the period from 1886 to 1901, to provide cars upon that basis, and also the understanding of the operators that for each coke-oven constructed the railway company would be required to add 1½ coal cars to the equipment apportioned to the Pocahontas field.

"During this time additional ovens were not allowed to be erected without the consent of the railway company, which exercised its right, under the contract above quoted, to limit and restrain such construction. In the fall of 1902, being importuned to remove this restraint, it did so, upon the express condition that it would thereafter recognize

no obligation upon it to build 1½ cars for each oven constructed.

"The Pocahontas Coal & Coke Company, a corporation organized under the laws of the state of New Jersey, is the owner of the greater portion of the Pocahontas coal land that has been leased to the defendant operators; a majority of the stock of the Pocahontas Coal & Coke Company is owned by the Norfolk & Western Railway Company. The Pocahontas Coal & Coke Company neither mines nor ships coal.

"There are in the Pocahontas district variations from the strict theory of the coke-oven basis in three important particulars: first, certain operators of the Great Flat Top Mountain receive an arbitrary percentage of the total number of available cars in the district before the residue of such cars are prorated among the remaining operators on the coke-oven basis; second, the percentage of available coal cars for another group of operations is based upon the number of ovens actually erected, plus a certain number of allotted or imaginary ovens; third, another group of operations have erected no ovens, but receive a percentage of available coal cars based wholly on allotted or imaginary ovens. The facts concerning these arbitrary allotments of cars are:

"1. In the beginning of the development of coal operations in the Pocahontas district the railway was constructed only to the east side of the Great Flat Top Mountain. Several coal developments were made there, which shipped their product exclusively to the east, inasmuch as there was no outlet by railroad to the west. Subsequently, at a great expense, the railway was extended to the Great Flat Top Mountain by tunnel and down the grades on the western side to the adjacent coal fields. In consequence of physical conditions, it costs five or ten

cents more per ton to haul coal to tide-water from the western than from the eastern group of mines. In order that the eastern mines might not have an undue advantage in freight rates over the western operations, it was sought to attain some form of compromise between the two divisions of the field, by which both would be given the same freight rates, and the eastern some advantage which would compensate it and not destroy the advantages of its natural location. An agreement or understanding was accordingly reached between the railway company and the operators east and west of the mountain whereby the two divisions of the field should receive the same rate, but that the 1,551 coal cars then in the service of the field should be retained for the exclusive use of the eastern operations. Subsequently, by agreement or consent of the operators in the entire field, the eastern operations in lieu of the original 1,551 cars, were allowed .05985 per cent of the total number of available cars in the district. The companies receiving this arbitrary allotment are: Booth-Bowen Coal & Coke Company, Buckeye Coal & Coke Company, Mill Creek Coal & Coke Company, Pocahontas Collieries Coal & Coke Company, Caswell Creek Company.

"2. The Goodwill Coal & Coke Company has 90 ovens erected and receives a percentage of cars based upon 50 allotted ovens in addition thereto, or 140 ovens in all. The Louisville Coal & Coke Company, with 135 ovens erected, receives a percentage of cars based upon 25 allotted ovens, or 160 in all. This allotment of imaginary ovens as a basis of car distribution was agreed to or rather acquiesced in by the other operations in the field.

"3. The following companies had erected no ovens, but received a percentage of the available car supply based

upon the number of allotted or imaginary ovens set opposite their names:

	Ovens
Hiawatha Coal & Coke Company	93
Pawama Coal & Coke Company	32
Piedmont Coal & Coke Company	87
Smokeless Coal & Coke Company	21
Spring Coal & Coke Company	115
Walbridge Lease No. 9 Coal & Coke Company	89
Wenonah Coal & Coke Company	116
Weyanoke Coal & Coke Company	82
Zenith Coal & Coke Company	122

"This arrangement, which has been acquiesced in by the other operations in the field, appears to have been adopted as a temporary basis for the distribution of cars to said companies, which are comparatively new, to enable them to ship coal while they are opening and developing their mines, and constructing the coke ovens required under their leases. The arrangement has been prolonged by the unsettled state of the question of car distribution in the Pocahontas field, which had been one of conference and negotiation for at least 18 months prior to the date of filing this complaint. The operations other than those named in the foregoing exceptions received their share of available cars for commercial shipment of coal strictly in accordance with the number of coke ovens erected.

"It is said to cost approximately $500 to erect a coke oven. Upon this basis the complainant, with 225 ovens, has invested about $112,500 in coke ovens, a portion of which must be regarded as a premium paid for the use of coal cars, in view of the fact that either because there is not a market for all the coke which can be produced in the district, or on account of the inability of the railroad com-

pany to furnish sufficient cars, or perhaps for other commercial reasons, a large proportion of the ovens already erected are not in use. Data upon this point furnished by complainant at the hearing are as follows:

Year	Ovens erected	Ovens burning	Percentage of ovens burning
1897	5,232	2,650	50.6
1898	5,232	3,689	70.1
1899	5,363	3,835	72.8
1900	5,507	4,293	77.9
1901	6,000	4,252	70.8
1902	6,866	4,067	59.2
1903	7,884	5,889	65.8
1904	9,138	4,107	44.9
1905	9,526	5,936	62.3
1906	10,175	5,345	52.5

"Assuming, as appears to be the unquestioned fact, that there are more ovens now erected than can be operated profitably or otherwise, and that the car supply is not increased, it follows that complainant, or any other operator, in order to increase the output of his mine, must construct at a cost of $500 each a sufficient number of ovens to increase his percentage of the total number of ovens; and even with the increasing car supply he must follow the same course if he desires relatively to increase the output of his mine as compared with that of other mines in the same field.

"In its answer herein the defendant railway denied that in its application of the coke-oven basis it has unjustly discriminated against complainant or any other shipper in the Pocahontas field, but repeats that it has no choice or profit in the premises, and simply stands ready to obey the Commission's decree upon the subject of car distribution, whatever that judgment may be. At the hearing the railway company, by its president, expressly denied any legal obli-

gation to continue the coke-oven basis in force, and showed that in the past it had indicated its willingness to substitute therefor a capacity basis of car distribution, if such change appeared to be desired by the greater proportion of operators in the field.

"Upon the request of the railway company's president, a majority of the operators in the coal field met the officials of the railway company in Roanoke, Va., on October 18, 1906, at which time the president stated to the operators that 'on request of 75 per cent of the representation in the Pocahontas field I would be willing to put the Pocahontas field, as well as other fields, on a capacity basis,' and explained that by capacity basis he meant 'a capacity of mines for loading and shipping and selling coal.' At this meeting, voting by the number of ovens erected, over 71 per cent of the field favored the capacity basis. The president then requested the operators to confirm their vote by letter. The result of the returns was 7,227 ovens in favor of a capacity basis, 2,638 against such basis, while 2,090 did not reply. Thus only 60.4 per cent of the field confirmed its desire for the capacity basis, and the president, in accordance with the implied terms of his proposition, made no change in the method of car distribution.

"The railway company further contends that whether or not it was or is under any legal obligation to provide 1½ cars for each coke oven erected, it has actually furnished a sufficient number of cars to meet the requirements. At the date of the 'Coal Producers' Contract,' the average coal car capacity was 21 tons, while it is now 43 tons. On August 31, 1907, with 10,472 ovens erected, the field was entitled on the basis of 1½ cars per oven, to 15,708 cars, and there were 15,256 cars actually assigned to it, or a shortage of only 452 cars on the actual car basis; but upon a tonnage basis these 15,256 cars would be equiv-

alent to 31,586 cars of 21 tons capacity, showing an excess of 15,875 cars over the required number when figured on a tonnage basis. The railway says that on or before December 31, 1907, a number of cars now in course of construction will be received and put into service in the Pocahontas district, which will increase the actual number of cars assigned to that field to 16,002, or an excess of 294 cars over and above 1½ times the number of coke ovens erected.

"By reason of a temporary addition to its motive power, during July and August, 1907, the railway company was able to furnish all the coal cars which the operations in the Pocahontas field could load, thus placing the field for those two months upon practically a capacity basis.

"The following table shows the percentage of available car supply to which each operation was entitled under the coke-oven basis and the percentage of the total output of the field furnished by each operation during the two months in question.

"This table does not furnish an accurate basis of comparison between the percentage of shipments by each operation under the coke-oven basis and under the conditions existing in July and August, 1907, for the reason that cars loaded with coal for the use of the Norfolk & Western Railway are not counted against the distributive percentage of the various mines under the coke-oven basis and are counted in the percentage of total output for July and August in the foregoing table. The record does not indicate what proportion of the coal so loaded was for the use of the railway company. Taking this table as it stands it appears that 22 operations increased their relative output as measured by the coke-oven basis, 17 decreased their relative output, and 8 showed an increase

Statement showing coal car percentage allotted by the Norfolk & Western Railway Company (as per its percentage sheet No. 51, effective April 1, 1907) and the actual percentage shipped by each company of the total tonnage in July–August, 1907.

Operations.	Ovens erected Apr. 1, 1907.	Oven rating in effect since Apr. 1, 1907.	Percentage of coal cars (engine fuel included) shipped in July, 1907.	Percentage of coal cars (engine fuel included) shipped in Aug., 1907.
Pocahontas Coll. Co	800	0.09728	0.07233	0.08177
Pocahontas Consol. Co.:				
Angle colliery	192	.01620	.03972	.04158
Cherokee colliery	128	.01080	.02345	.02183
Caswell Creek colliery	231	.02674	.02323	.02712
Delta colliery	120	.01012	.04236	.03466
Lick Branch colliery	168	.01333	.02279	.02503
Norfolk colliery	322	.02717	.....	.....
Rolfe colliery	100	.00844	.....	.....
Sagamore colliery	280	.02363	.....	.....
Shamokin colliery	389	.03283	.02756	.02343
Browning mines	73	.00616	.00256	.00362
Booth-Bowen C. & C. Co	177	.02347	.01395	.01467
Buckeye C. & C. Co	172	.01989	.01656	.01940
Goodwill C. & C. Co	140	.01181	.01825	.01947
Louisville C. & C. Co	160	.01350		
Crystal C. & C. Co	140	.01181	.01371	.01168
Thomas Coal Company	146	.01232	.00843	.00807
Pinnacle C. & C. Co	200	.01688	.01730	.01349
Crane Creek C. & C. Co	200	.01688	.01737	.01168
Coaldale C. & C. Co	140	.01182	.04133	.04040
Mill Creek C. & C. Co	215	.02706		
Elkhorn C. & C. Co	170	.01434	.02008	.01738
Crozer C. & C. Co	354	.02987	.03613	.03470
Houston C. & C. Co	230	.01941	.02257	.02427
Upland Co	232	.01958	.03166	.03407
Powhatan C. & C. Co	225	.01899	.02250	.02670
Lynchburg C. & C. Co	213	.01797	.01722	.02058
Algoma C. & C. Co	225	.01898	.01730	.01968
Elk Ridge C. & C. Co	200	.01688	.01304	.01356
Gilliam C. & C. Co	217	.01831	.02360	.02350
Indian Ridge C. & C. Co	200	.01688	.01524	.01433
Roanoke C. & C. Co	130	.01097	.01348	.01565
Arlington C. & C. Co	158	.01333	.01297	.01530
McDowell C. & C. Co	200	.01688	.03283	.03157
Greenbrier C. & C. Co	200	.01688	.02440	.02225
Ashland C. & C.	300	.02532	.01378	.01377
Monitor colliery	110	.00928	.01903	.01961
Zenith Coal & Coke Co	126	.01063	.01092	.01134
Keystone Coal & Coke Co	211	.01780	.02177	.02190
Pulaski Iron Company	260	.02194	.02397	.02580
Eureka Coal & Coke Co	200	.01688	.01891	.01592
Shawnee Coal & Coke Co	188	.01586	.01568	.01630
Empire Coal & Coke Co	250	.02110	.02646	.02879
Peerless Coal & Coke Co	254	.02143	.02074	.01697
Bottom Creek Coal & Coke Co	220	.01856	.01708	.01787
Tidewater Coal & Coke Co	300	.02532	.01319	.01085
Widemouth allotment	635	.05359	.06391	.06272
Middle States C. & C. Co	150	.01266	.01224	.00953
Page C. & C. Co	600	.04222	.01942	.01899
Total	11,141	1.00000	1.00000	1.00000
Total coal cars shipped	.....	.....	13,645	14,381

in one month and a decrease in the other under the conditions prevailing in July and August, 1907. Although complainant, under the coke-oven basis, is entitled to but 0.01899 per cent of the available car supply, it produced

and shipped during July 0.02250 per cent, and during August 0.02670 per cent of the aggregate output of the district. During 1906 it shipped, on an average, about 10,000 tons a month; in July, 1907, it shipped 15,350 tons, and in August, 19,200 tons. A portion of its increase in actual tonnage may be due to the fact that during July and August the railway company was able to furnish all the cars required, whereas previously it had seldom, if ever, done so, rather than to the temporary substitution of a capacity basis of distribution.

"The Page Coal & Coke Company, with 500 ovens erected, is entitled to 0.04222 per cent of the available car supply, as compared with the complainant's percentage of 0.01899, based upon 225 ovens; yet in July and August, respectively, the Page Company furnished only 0.01942 and 0.01899 per cent of the aggregate shipments of the field, while complainant furnished 0.02250 and 0.02670 per cent thereof. The Algoma Coal & Coke Company, with the same number of ovens and percentage of available car supply as complainant, furnished in July and August, respectively, 0.01730 and 0.01968 per cent of the total output of the field, as compared with the complainant's said percentage of 0.02250 and 0.02670. Other similar comparisons are apparent from consideration of the table.

"It further appears that under the present basis of distribution certain companies have not in the past loaded all the cars to which they were entitled, and such excess of cars was divided among other operations by private arrangement among the mine owners. An exhibit introduced by complainant shows that during 1906 the Pocahontas Collieries, Norfolk, Rolfe, Sagamore, Shamokin, Booth-Bowen, Buckeye, Goodwill, Crystal, Crane Creek, Algoma, Elk Ridge, Ashland, Shawnee, Peerless, Bottom

Creek, Tidewater and Page companies did not load the number of cars to which they were entitled under the coke-oven basis. A further significant fact is that of the companies named above, the Pocahontas Collieries, Shamokin, Booth-Bowen, Buckeye, Goodwill, Ashland, Shawnee, Peerless, Bottom Creek, Tidewater and Page companies are among those which under the conditions existing in July and August, 1907, shipped a smaller proportion of the aggregate output of the field than the percentage of available car supply to which they are entitled under the coke-oven basis. As stated above, there are certain advantages in the working of mines enjoyed by the operators of thick beds of coal which vary from 6 to 11 feet in thickness. The so-called thin veins are those less than 6 feet thick. The labor in mining coal in the Pocahontas district consists mainly in cutting under a vein of coal. After this work is performed the coal is loosened by the discharge of powder placed at the top of the bed. While it requires as much labor to cut under a thin as a thick vein, in the latter case the miner obtains as a result of his labor more coal than results from an equivalent expenditure of energy in the former. As a result of this condition in respect of labor, differences in the size of mine-cars used and other circumstances peculiar to thick vein mines, the production of a given amount of coal is more expensive to the thin than to the thick vein operator.

"The Indian Ridge Coal & Coke Company, one of the defendants in this proceeding, operating a thin vein mine, presented evidence at the hearing, and by argument and brief, earnestly urged continuance of the coke-oven basis. This company avers that on April 1, 1893, it leased 956 acres of land in the Pocahontas district; that it has built thereon 200 coke-ovens, and in good faith invested several hundred thousand dollars in the development of its property upon

the assumption that the railway company would furnish 1½ cars for each oven erected, and distribute its cars upon the coke-oven basis; and that if cars are distributed on the capacity basis the output of the thick vein mines, by reason of the advantages already mentioned, will be greatly increased and the output of the thin vein mines proportionately decreased. This company admits that the coke-oven basis limits the relative output of each mine and avers that the existence of the thin vein miner depends upon preserving the present method of car distribution.

"The effect of a capacity basis of car distribution upon the Indian Ridge and other thin vein operations could not, of course, be determined in advance of an actual test of the operation of that system. While the apprehensions entertained by the Indian Ridge Company are perhaps the logical result of actual and practical experience, they are in the very nature of things at present incapable of positive demonstration.

"The Indian Ridge Company further contends that the acts of the parties in the Pocahontas field, constituting the basis upon the fate of which large amounts of money have there been invested in mines and coke ovens, amount at least to an implied contract between the railroad company and the operator, imposing upon the former the affirmative duty of maintaining and continuing the method of car distribution which was one of the major inducements for the opening and development of thin vein mines. It has been stated heretofore that the railway company expressly disclaims any legal or other obligation to continue the coke-oven basis.

"The testimony of Mr. L. E. Johnson, president of the defendant railway company, is interesting in this connection. At the hearing Mr. Johnson said:

" 'I favor abandoning the present basis of car distribu-

tion—the coke-oven basis—and believe that the time has arrived when we should go to a well-defined and systematic capacity basis.'

"Again, after describing the conditions which led to the adoption of the coke-oven basis, Mr. Johnson continued:

" 'Changed conditions have also been brought about in the Pocahontas district. The abnormal demand for coal that sprang up four or five years ago has made the business attractive to investors, and new operations have been opened up in the Pocahontas field, some of which are on the lands of the original land owners, others upon individual property, and negotiations are constantly before railway officials for opportunities to open up operations on property that belongs individually either to those parties who are desirous of opening the operation or to lease from the individual owners; so that, as a common carrier, we are bound to furnish equipment to the best of our ability to these operators who have gone into business and have not built coke-ovens, and do not intend to build coke-ovens, and there is no way in which the railway can bring any influence to bear upon these people to construct ovens for the purpose of car distribution.

" 'In the consideration of this question I have recognized that there might be some possible injury temporarily done to some few of the operations that are in what is called and termed the thin vein district; but there are but few operations in that district that have constructed coke-ovens. The large majority of those, especially in the Widemouth district, have not constructed coke-ovens and I think it might be advisable to state that one of the reasons they have not built coke-ovens is because they commenced the opening of operations about the time that this question of doing away with the coke-oven basis of

car distribution was becoming an active matter of discussion.

" 'I do not believe that the change from the coke-oven basis to a capacity basis would ultimately work an injury to this particular section of the field. They have the opportunity of spending the money which they would put into coke-ovens by putting it into their underground workings and thereby enable them to produce a great deal more coal, and upon which they have in the past and are now, so far as we know, producing coal at a profit to themselves. While the profit may not be the same as the unit per ton of those in the thicker vein fields, yet it is a profitable business and may fairly be presumed to be a profitable business proposition.

" 'But, above all the other considerations, I believe it should be changed to the capacity basis and that basis be determined by the assistance of the operators so that a uniform method of car distribution may be applied to all the coal fields and all the operators and all the producers alike.

" 'In the other coal fields served by the defendant railway the distribution of coal cars to individual operations is made upon a capacity basis.'

"This witness gave the following explanation of his failure to substitute a capacity basis of car distribution for the coke-oven basis:

" 'There has been an agreement or there has been an understanding on the part of the railway company with its operators that the coke-oven basis was the basis of car distribution, and I have not felt at any time, neither do I feel now, that the railway company would be justified in changing a method that was established twenty-three years ago, which has been in force all the time, and for many years has served its purpose well, without the

approval and consent of a very large majority of those who have received their car distribution on that basis.'

"It is the duty of railroad companies to provide suitable vehicles of transportation and to offer their use impartially to all shippers. That unjust discrimination in the matter of car distribution is prohibited by the act to regulate commerce has been repeatedly held by the Commission:

Richmond Elevator Co. vs. P. M. R. R. Co., 10 I. C. C. Rep. 629.
Eaton vs. C. H. & D. R. R. Co., 11 I. C. C. Rep. 619.
R. R. Com. of Ohio vs. H. V. Ry. Co., 12 I. C. C. Rep. 398.

"While the mine capacity of a given shipper of coal may be greater than his allotment of cars, yet where this is also the case as to other shippers similarly situated in the same coal field, it is the duty of the carrier, when the supply of cars is inadequate, to fairly distribute the available number among all operators, including the shipper in question.

United States, ex rel. Coffman vs. N. & W. Ry. Co., 109 Fed. Rep. 831.

"It only remains, therefore, to determine whether the facts disclosed in this proceeding sustain the charge of unjust discrimination against complainant in the distribution of coal cars by the defendant company in the Pocahontas field.

"The 'coke-oven basis' is characterized in argument and briefs as 'archaic,' 'anomalous,' 'absurd,' 'arbitrary,' etc. Each of these adjectives may thoroughly describe the system and yet not indicate that it violates any provision of the regulating statute. 'The mere showing of such a rule and claim that it works discrimination is insufficient. The actual effect of the rule during the time covered by the complaint is necessary to a determination of the question of unfairness in the distribution of cars'—

Richmond Elevator Co. vs. P. M. R. R. Co., supra.

"The argument for the coke-oven basis is well summarized by the court in United States, ex rel. Coffman, vs. N. & W. Ry. Co., 109 Fed. Rep. 831, in the following language:

" 'It is convenient for the railway because it is uniform in principle and conducive to the education of its employees upon fixed and mathematical lines; and it is highly advantageous to the coal operators—First, because of the publicity of its operation. Under it secret discrimination by the railway company in favor of one operator against another is impossible. Each operation knows the number of coal cars owned by the railway company and the number of completed coke ovens in the field. Each operation knows the number of its own ovens and the number of its neighbor's, and, in consequence, knows its particular percentage in the allotment of cars. There can be, therefore, under such a system no secret discrimination whatever. Secondly, each operation having knowledge of the number of cars, the number of ovens, and its own percentage of distribution, knows exactly what car supply it can rely upon, and is enabled, in consequence, to employ its hands, dig, ship, and sell its coal accordingly. In other words, each operation attains regularity in its business. What may be designated as an unreliable or mercurial business—that is to say, a business first up and then down in volume—is avoided, and all the beneficial results of trustworthy regularity are realized.'

"These observations appear in the decision of the court upon the application of Coffman, sales agent of the Indian Ridge Coal & Coke Company, for a writ of mandamus under the act to compel the Norfolk & Western Railway Company to furnish cars for shipments of coal to certain vessels at Lambert's Point, Va. The court held that inasmuch as unjust discrimination in the distribution of

coal cars had not been proved the writ of mandamus would not issue.

"In marked contrast with the paragraph quoted from the Coffman case are the following remarks of the court in United States, ex rel. Kingwood Coal Company vs. W. Va. Northern R. Co., et al., 125 Fed. Rep. 252:

" 'I am of the opinion that in reaching a proper basis for the distribution of railroad cars it is necessary that an impartial and intelligent study of the capacity of the different mines be made by competent and disinterested experts, whose duty it should be to carefully examine into the different elements that are essentially factors in the finding of the daily output of the respective mines which are to share in the allotment. Among the matters to be investigated are the following: The working places, the number of mine cars and their capacity, the switch and tipple efficiency, the number and character of the mining machines in use, the hauling system and the power used, the number of miners and other employees, the mine openings, and the miners' houses. . . . The capacity of a coal mine for rating purposes is the amount of coal it is able to place in the railroad cars in a given time, and that depends on its working places, the thickness of its coal seams, its switches, workmen, mine cars and tipples, its general equipment and its management. The output of a mine is the amount of coal it in fact places in the railroad cars for shipment, and that is regulated by the number of such cars it is able to secure, provided its general equipment is efficient, and it may be, and generally is, less than its capacity, but can never exceed it. It is on account of these matters and those similar in character—of frequent occurrence in the mining regions—that no iron-clad rule can be established with safety for the disposition of the questions we are now considering. And so it is that

no separate element of the mines capacity can be said to certainly control its output, which can, in fact, only be determined by the careful observation of impartial experts who have worthily and discriminately studied and applied the conditions applicable thereto.'

"In affirming the decision of the Circuit Court in the Kingwood case, the Circuit Court of Appeals, in an opinion by Mr. Chief Justice Fuller, 134 Fed. Rep. 198, said, *inter-alia:*

" 'Granting that discrimination has resulted in diminishing the relative output of the Kingwood mine for lack of its just proportion of cars that discrimination was unlawful, and the correct distribution and rating cannot be allowed to be affected by conduct contrary to law.'

"It appears upon inspection that the record of this case does not disclose the relative capacity of mines of the complainant and other operators in the Pocahontas field by comparison of the number of working places, number and size of mine cars, mining machines and other elements which tend to show the working capacity of a mine. Owing to the fact that the distribution of cars in this field has been for many years upon the coke-oven basis, it may be that no capacity rating of these mines has ever been made, and therefore none could be shown at the hearing. In the absence of such comparative data it is not altogether easy to decide the issue of discrimination, because it might well be claimed that if the coke-oven basis, with the exceptions noted, does as a matter of fact measure with approximate correctness the relative car rights of the different operators in the Pocahontas field, then whatever may be its probable effect upon the future development of that field and of complainant's mine, no present discrimination can be said to exist.

"It is remarked above that the coke-oven basis, with

certain exceptions, is now in force in the Pocahontas coal field, but this is hardly an accurate statement. The actual fact appears to be that there are today in that field two separate and distinct methods of division. To a majority of the mines cars are distributed in proportion to the number of coke-ovens erected. The eastern operations, regardless of the number of ovens heretofore built, receive .05985 per cent of the aggregate car supply, while the operations mentioned under exception (3) received of the available cars a share equivalent to that which would accrue to them upon the erection of 757 ovens. It is difficult to explain this arbitrary allowance except upon the theory of an honest effort to approximate the relative capacity of the several mines in question. It follows, therefore, that in the distribution of cars throughout the field the coke-oven basis is applied to certain mines while to other mines is applied what may be termed a modified capacity basis. Nor could it be doubted that, in the case of refusal of any present or prospective operator to erect coke-ovens it would be the duty of the railway company to furnish such operator with a fair share of its available car supply.

"While the coke-oven basis may have the various advantages of publicity and uniformity mentioned by the court in the Coffman case, it has also the inherent disadvantage among others of lacking flexibility and adaptation to varying needs. It seems self-evident that the application of a uniform and rigid rule to widely dissimilar conditions is likely to result in unjust discrimination. The failure of the coke-oven basis to meet the exigencies of the situation is shown in the counting of assumed or imaginary ovens in addition to the ovens actually erected, and in the distribution of cars to the Hiawatha and other companies purely upon the basis of hypothetical ovens. Moreover,

the continuance of that basis under present conditions must involve an economic waste which ought to be avoided. The record shows that about 52 per cent of the existing coke-ovens are sufficient to supply the current demands for coke from the field in question. This means that in order to increase its relative output of coal complainant must erect additional ovens at an expense of $500 each, with no other reason for the outlay or benefit therefrom than the resulting addition to the number of cars which would be secured for shipments of coal, and without regard to any increase or decrease in the productive capacity of its mines.

"It requires only ordinary imagination to see the illogical and artificial character of the coke-oven basis. One company with limited capital uses its money in building coke ovens instead of extending its underground workings, while another company expends the same sum in enlarging its mining facilities, but without adding to the number of its superfluous ovens. The necessary result would be that the former, with its mining capacity unchanged, would secure an increased car supply, while the latter, with largely augmented ability to produce coal, would have fewer cars for its shipment. A system which involves such absurd consequences is certainly open to grave objection.

"The situation in the Pocahontas field at present is not greatly at variance with the case supposed. During the year 1906, under the coke-oven basis, the Pocahontas, Norfolk, Rolfe, Sagamore, Shamokin, Booth-Bowen, Buckeye, Goodwill, Crystal, Crane Creek, Algoma, Elk Ridge, Ashland, Shawnee, Peerless, Bottom Creek, Tidewater and Page companies were entitled to and received many more cars than they had occasion to use; while, according to the record, complainant was never able to secure a sufficient number to approximate its loading capacity. In

other words, in the same field, and among operators similarly situated, one concern was seriously crippled by car shortage, while other concerns had more cars than they could load.

"It has already been observed that the distribution sheet for July and August, 1907, does not furnish an accurate basis of comparison, for the reason that shipments of fuel coal for carriers' use are included therein, while the cars for such shipment are not charged against the allotment under the coke-oven basis. Nevertheless, this record is strongly suggestive. The Page Company, with 500 ovens erected and entitled under the coke-oven basis to more than twice as many cars as complainant, shipped during July and August, respectively, only 0.01942 and 0.01899 per cent of the aggregate output of the field, as against complainant's shipments of 0.02250 and 0.02670 per cent of such aggregate. Thus, while both mines were supplied with cars to the extent of their working capacity, a company entitled to twice as many cars as complainant actually loaded much less tonnage during the period in question. When to this is added the fact that eleven of these companies, which in July and August failed to ship a proportion of the total output of the field equivalent to their share of available equipment under the coke-oven basis, also failed during the year 1906 to use all the cars to which they were entitled under that basis, the convention is quite irresistible that the coke-oven basis does not fairly measure the relative rights of the various operators in the Pocahontas district.

"Upon consideration of all the facts and circumstances disclosed in this case, and with our view of the obligations of the defendant carrier, we are led to the conclusion that the present basis of car distribution to mines in the Pocahontas field unduly and unjustly discriminates against

complainant and operates to the undue and unreasonable preference and advantage of other mining companies in the same field.

"It appears that the defendant railway company some years ago became and still is the virtual owner of the coal land upon which the operations in question are located, the legal title thereto being in the land company whose stock is owned by the railway company. The coke-oven basis of car distribution seems to have been the outcome of a general policy of the railway company, in accordance with which the land company required each lessee of coal lands to construct a certain number of coke ovens per 100 acres of land leased as above stated. This policy was evidently adopted for the purpose of encouraging coke production and the manufacture in that district of articles which could be produced by the use of coke. The railway company now prefers to discontinue the coke-oven basis and apparently desires an order of the Commission as a justification for taking that course.

"While we are convinced by the facts and circumstances disclosed that the present basis is unjust and results in unlawful discriminations, we are not unmindful that the change which will be directed may occasion loss and injury to some of the operators whose expenditures for the construction of coke-ovens, as required by their leases, may be materially and perhaps greatly diminished in value. Although not warranted in sanctioning a further continuance of the coke-oven basis, which under existing conditions is found to be neither just nor suitable, we do not desire or intend that the report and order herein shall affect the rights, responsibilities or liabilities of any of the interested parties under any contract or agreement which they might otherwise be able to enforce for their benefit.

"In its petition complainant asks for reparation, but no

evidence was offered as to the amount or the extent of the damages suffered, and it is to be inferred that this demand has been virtually abandoned.

"Upon argument, the authority of the Commission to prescribe the method of car distribution to be substituted for the coke-oven basis was challenged. We deem it unnecessary to express an opinion upon that point for two reasons: In the first place the record is not sufficiently complete to warrant an attempt to prescribe, except possibly in the most general way, the system or method which should hereafter be followed in the distribution of cars to the various mines in the Pocahontas district. Secondly, the discontinuance of the coke-oven basis, which will be required by an appropriate order, will involve the adoption of a system which does not result in unlawful discrimination, and we think the defendant railway company should take the responsibility, at least in the first instance, of determining and applying the substituted basis.

"In dealing with this question of car distribution, the Commission in its report of certain investigations under the joint resolution of Congress of March 7, 1906, commonly referred to as the coal and oil investigation, made the following, among other, recommendations:

" 'That every common carrier engaged in interstate transportation of coal be required to make public the system of car distribution in effect upon its railway and the several divisions thereof, showing how the equipment for coal service is divided between the several divisions of its road and how the same in times when the supply of equipment does not equal the demand is divided among the several mining operations along such road; and that the carrier further be required to publish at stated periods and at each divisional headquarters upon its line of road the system of car distribution in effect and the actual

distribution made to each mining operation under such system.

" 'That where the capacity of the mines is the basis for the distribution of equipment, a fair, just and equitable rating of the mines be required and that provision be made for the representation of owners of the mines at the rating thereof.'

"These recommendations are here quoted not as definite directions to be followed by the defendant railway company, but rather as indicating the principles which, in our judgment, should be observed in order to provide a fair and equitable distribution of cars when the available equipment is insufficient to meet all demands. It is assumed that some form of capacity basis suited to the conditions and peculiarities of the district in question will be devised and put into effect. An order will be entered in accordance with the views thus expressed."

While the Commission did not condemn the coke-oven basis of rating mines as inherently defective as a basis of car distribution during car-shortage periods, it did reject the coke-oven basis in the Pocahontas field because of the undue discriminations among mine operators arising under it in the distribution of coal car equipment.

CHAPTER X.

CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1 Car Distribution Systems in Effect on Indiana and Illinois Coal-Carrying Roads.
(1) Atchison, Topeka and Santa Fe Railway Company.
(2) Chicago and Northwestern Railway Company.
(3) Chicago, Indianapolis and Louisville Railway Company.
(4) Chicago, Terre Haute and Southeastern Railway Company.
(5) Missouri Pacific Railway Company and St. Louis, Iron Mountain and Southern Railway Company.
(6) Chicago, Milwaukee and St. Paul Railway Company.
(7) Illinois Central Railroad Company.
(8) Chicago, Rock Island and Pacific Railway Company.
(9) Chicago and Eastern Illinois Railroad Company.
(10) Cleveland, Cincinnati and St. Louis Railway Company.
(11) Vandalia Railroad Company.
(12) Chicago, Burlington and Quincy Railroad Company.
(13) Chicago and Alton Railroad Company.
(14) Wabash Railroad Company.
(15) Litchfield and Madison Railway Company.
(16) Southern Railway Company.
(17) Baltimore and Ohio Southwestern Railway Company.
(18) Elgin, Joliet and Eastern Railway Company.
(19) Chicago, Peoria and St. Louis Railway Company.
(20) Toledo, Peoria and Western Railway Company.
(21) Minneapolis and St. Louis Railway Company.
(22) St. Louis and Belleville Electric Railway Company.
(23) East St. Louis and Suburban Railway Company.
(24) Louisville and Nashville Railroad Company.
§ 2. Pooling of Cars by Mine Operator.
§ 3. Car Distribution to Coal Mines; Federal Court on Mine Ratings.
§ 4. Contracts for Car Supply.
§ 5. Carriers not Generally Required to Establish Mine Ratings for Car Distribution.
§ 6. Car Distribution for Fruits.

CHAPTER X.

CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1. Car Distribution Systems in Effect on Indiana and Illinois Coal-Carrying Roads.

In Coal and Oil Investigation, 31 I. C. C. Rep. 193, 219, the Commission rendered a report of the practices obtaining on several Indiana and Illinois coal-carrying roads for the distribution of coal car equipment to mines. This report is summarized as follows:

(1) **Atchison, Topeka & Santa Fe Railway Company:** Has but few mines on its lines; no published rules governing the distribution of coal car equipment to mines. In times of car shortage mines are rated according to their commercial capacity and all available cars counted against these ratings.

(2) **Chicago & Northwestern Railway Company:** Three mines located on its lines in Illinois owned by one company; no need for car distribution system.

(3) **Chicago, Indianapolis & Louisville Railway Company:** Six mines located on its lines in Indiana belonging to one company; no need for coal car distribution rules.

(4) **Chicago, Terre Haute & Southeastern Railway Company:** Has many mines on its lines in Indiana; no published rules governing coal car distribution to mines. In times of car-shortage all classes of cars are distributed among mines on a monthly working-hour basis, the pur-

pose of this method of distribution being to permit all mines to work practically the same number of full days during a month.

(5) **Missouri Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company:** Has substantial number of mines on lines in Illinois; each line publishes rules governing the distribution of coal car equipment to mines during periods of car shortage. Carriers give each mine a daily rating based on its capacity, the record of such ratings being open to the inspection of mine operators. In the case of junction-point mines having connection with two or more carriers, the ratings are divided by the number of carriers serving such mines. All classes of equipment, except closed cars, but including company fuel cars, private cars and foreign-consigned cars are counted against the mines receiving them. Orders for cars for company fuel coal loading are given preference over all other orders, cars being divided among all mines in proportion to their ratings after company fuel coal orders are taken care of, although company fuel cars are included in figuring the total distribution. If the number of company fuel cars, private cars and foreign-consigned cars delivered to a mine on a particular day causes the mine's rating proportion of available cars to be exceeded the average is charged against subsequent days' allotments.

(6) **Chicago, Milwaukee & St. Paul Railway Company:** Six or seven mines on lines in Illinois, including mines of the St. Paul Coal Company (owned by the carrier); publishes no rules governing the distribution of coal car equipment to mines. In times of car shortage company fuel coal loading is given preference over all other orders, and available cars are so distributed to mines that all mines work practically the same number of hours.

(7) **Illinois Central Railroad Company:** This road is the largest coal-carrying road in Illinois, having on its lines 108 mines, located in 20 counties of the state; most of these mines are local to the Illinois Central, being served by it alone; several are junction-point mines, being served by other roads in addition to the Illinois Central, and a few have water outlets. This road transports about 15 per cent of the total quantity of coal shipped from Illinois mines annually.

June 1, 1911, this road issued a circular embodying rules which should apply in the rating of mines and the distribution of cars in accordance therewith. This set of rules was approved by the mine operators and was in effect substantially all the time until January 2, 1913, when the rules were revised as a result of the Interstate Commerce Commission's opinion "In re Irregularities in Mine Ratings," 25 I. C. C. Rep. 286. Between February 9 and March 1, 1912, the carrier had in effect another circular of rules in which it attempted to rate mines on the basis of tonnage shipped over its lines only. This plan was in accordance with the views of local mine operators, but contrary to the views of junction-point operators, and was ordered cancelled. As a result of the disagreement between the carrier and the operators, and the further disagreement between the operators themselves, the matter was brought to the attention of the Interstate Commerce Commission, with the result that an investigation was ordered by the Commission, and its report and findings made in the above entitled proceeding.

In its opinion the commission ruled that all mines on the Illinois Central Railroad should be rated on an hourly production basis. The Commission further expressed its opinion that on days when a junction-point mine ordered cars from no other carrier it was entitled to its full rating

on the Illinois Central; on days when it ordered cars from one other road its rating should be 75 per cent of its full capacity, ascertained on the hourly production basis, and on days when it ordered cars from two other roads its rating should be 50 per cent of such capacity.

In accordance with this opinion of the Commission the Illinois Central Railroad Company issued revised rulings, effective January 2, 1913, putting into effect the Commission's rulings.

(8) Chicago, Rock Island & Pacific Railway Company: Ten mines on its lines in Illinois; does not publish rules governing distribution of coal car equipment to mines. Mines are not rated, the chief dispatcher having in charge the distribution of coal cars, and in times of car shortage distributes available cars among the mines in proportion to the number of cars loaded by each during the preceding thirty days; all cars—company fuel, private and foreign-consigned included—being counted against the mines receiving them.

(9) Chicago & Eastern Illinois Railroad Company: Has numerous mines on its lines in Indiana and Illinois, principally in Illinois; no published rules governing coal car equipment distribution to mines. In times of car shortage mines are given a daily rating, based on average monthly shipments and cars are distributed in accordance therewith.

The distribution records are open for inspection by the mine operators and all disputes as to relative ratings are settled by hearings held by the carrier, at which mine operators are invited to express their views.

All cars—including company fuel cars, private cars and foreign consigned cars—furnished by this carrier are counted against the mines receiving them. Cars for the Bunsen Coal Company at Westville, Ill., are furnished by

the Elgin, Joliet & Eastern Railway Company operating over the tracks of the Chicago & Eastern Illinois Railroad Company, and are not included in the latter carrier's distribution.

(10) Cleveland, Cincinnati, Chicago & St. Louis Railway Company: Has several mines on its lines in Indiana and Illinois; no published rules governing the distribution of coal cars among mines. In the past this carrier had not counted company fuel cars, private cars and foreign-consigned cars against mine ratings, but in the future, in the event of car shortage, would be governed by the Commission's rules.

(11) Vandalia Railroad Company: Has substantial number of mines on its lines in Indiana and Illinois; has published rules governing the distribution of coal car equipment to mines. Mine ratings are determined by taking the average output of each mine on days in the calendar month when it received a full supply of cars and operated without interruption. Each mine in a district receives a rating proportion of available cars in that district. The total number of cars to be placed for loading company fuel coal is deducted from the available car supply and the remainder is distributed on the percentage basis. The rated capacity of each mine furnishing company fuel coal is reduced by the tonnage furnished the carrier, to determine the mine's pro rata share of available cars on the percentage basis. In other words, a mine furnishing the carrier with fuel gets all the cars it needs for that purpose; in addition, it gets its proportion of cars for other loading.

This plan is not in accordance with the Commission's rulings.

Private and foreign-consigned cars delivered to a mine are counted against its rating. If the number of such cars

delivered on a particular day exceeds the mine's pro rata share of available cars, it is entitled to no other cars. If, however, the number of such cars is less than the mine's pro rata share, the mine receives additional cars to make up its total share.

(12) **Chicago, Burlington & Quincy Railroad Company:** Has several mines on its lines in Illinois; publishes rules governing the distribution of coal car equipment to mines. Operators are expected to fix and agree upon the mine ratings among themselves, but, failing to do so, this road establishes the ratings by taking the average loading of each mine on the road for a period of ten consecutive days when the mine operated full time and received empty cars in full of its requirements; to this 20 per cent is added for expansion.

All available cars for coal loading—including company fuel cars, private cars and foreign-consigned cars—are counted against the mine receiving them.

(13) **Chicago & Alton Railroad Company:** Has several mines on its line in Illinois; publishes rules governing the distribution of coal car equipment to mines. Mines are rated on a tonnage-capacity basis, the operators being expected to fix and agree upon these ratings, but in the event they fail to do so the carrier establishes the ratings on information at hand.

A record of the ratings of all mines is kept in the carrier's office and is open to the inspection of all operators.

Junction-point mines are rated according to the percentage that shipments over the Chicago & Alton Railroad bear to total shipments over all roads. This plan is not in accordance with the Commission's rulings.

All equipment available for coal loading—including company fuel cars, private cars and foreign-consigned cars—is distributed among the various mines in accordance

with their respective ratings. Company fuel, private and foreign-consigned cars are placed at the mines to which they are billed and counted against the ratings of those mines.

(14) Wabash Railroad Company: Has several mines on its lines in Illinois; publishes no rules governing the distribution of coal car equipment to mines. Mines are rated, in times of car shortage, according to output, and the ratings are revised from time to time as necessity requires.

The plan of distribution in times of car shortage is theoretically on the basis of such ratings, but in actual practice the plan is not strictly followed, discretion in the matters being left largely to the division superintendents.

(15) Litchfield & Madison Railway Company: Has few mines on line in Illinois; no published rules governing distribution of coal car equipment to mines. Mines are not rated. Claims no difficulty experienced in supplying necessary cars to mines.

(16) Southern Railway Company: Has several mines on its line in Illinois; publishes rules governing the distribution of coal car equipment to mines. Mines are rated in accordance with their commercial and physical capacities, and, in times of car shortage, coal cars are distributed to the mines in accordance with such ratings after deducting the number of cars assigned to compel fuel coal loading. Foreign-consigned and private cars are counted against the mine ratings.

(17) Baltimore & Ohio Southwestern Railway Company: Has several mines on its line in Indiana and Illinois; has published rules governing the distribution of coal car equipment to mines. Mine ratings for each mine operator are based on the highest daily average shipment of coal from all the mines of such operator for one

month during the extended period of full car supply next preceding the period of shortage. To this figure 10 per cent is added for expansion. All cars, except closed cars —including company fuel cars, private cars and foreign-consigned cars—are counted against the mines receiving them. When the number of cars delivered to a particular mine exceeds the percentage of available cars to which it is entitled that mine is eliminated from the percentage plan for that day.

(18) **Elgin, Joliet & Eastern Railway Company:** Eight mines on the line of this carrier in Illinois, not counting six Bunsen Coal Company's mines which this road serves over the rails of the Chicago & Eastern Illinois Railroad; no published rules governing the distribution of coal car equipment to mines. Claimed no car shortages have occurred in several years; therefore, no need for mine ratings.

(19) **Chicago, Peoria & St. Louis Railway Company:** Has several mines on line in Illinois; has no published rules governing coal car distribution to mines. In times of car shortage distributes available cars on percentage system based on the actual maximum output of the mines under normal conditions. All classes of equipment are counted against the mines receiving them.

(20) **Toledo, Peoria & Western Railway Company:** Has several mines on its Illinois lines; has published rules governing distribution of coal car equipment to mines. Mines are rated according to output and cars are distributed, in times of shortage, on a percentage basis in accord with such ratings; all cars, including company fuel cars, private cars, and foreign-consigned cars, are counted against the mine ratings.

(21) **Minneapolis & St. Louis Railway Company:** Has several mines on its lines in Illinois (formerly known as

the Iowa Central Railroad); no published rules for the distribution of coal car equipment to mines. Mines are not rated. Car distribution is in the hands of the chief dispatcher, who uses his judgment as to the equitable share to which each mine is entitled in times of car shortage. All cars, including company fuel cars, private cars and foreign-consigned cars, are counted against the mines receiving them.

(22) **St. Louis & Belleville Electric Railway Company:** Four mines located on this line in Illinois; no published rules governing the distribution of coal car equipment to mines. Has not experienced car shortage period yet when it could not furnish all needed cars.

(23) **East St. Louis & Suburban Railway Company:** Two mines are located on this line in Illinois; no published rules governing distribution of coal car equipment to mines. In times of car shortage plan is to deliver 45 per cent of available equipment to one mine and 55 per cent thereof to the other mine, these ratings being based upon the relative capacities of the two mines.

(24) **Louisville & Nashville Railroad Company:** Several mines on its line in Illinois; publishes no rules governing the distribution of coal car equipment to mines. Mines are rated according to their actual daily loading capacity. All cars, including company fuel cars, private cars and foreign-consigned cars, are counted against the mines receiving them.

See "Car Equipment and Supply," Chapter VIII—"Car Distribution to Coal Mines; Mine Ratings."

§ 2. Pooling of Cars by Mine Operator.

In Rail & River Coal Company case the Commission ruled that where a coal operator owns and operates several

mines, or openings of the same general mine property, and is entitled in the daily distribution of coal car equipment to a certain number of cars for each mine, such operator will not be prohibited from grouping or pooling all such cars, or any portion of them, at one mine, instead of using them at each mine in accordance with their respective ratings. In that particular case the mine operator owned several openings or mines, in the same general mining property, and the implication was that the several mines were all openings in the same mining operation. In the cited case the Commission found that there was not sufficient showing to enable it to say that this practice was unlawful and resulted in undue and unlawful discriminations.

The Commission later distinguished this holding, in the McCaa Coal Company case, where a mine operator owning several mines located in different sections of the country, far removed from one another, but served by the same railroad system, attempted to justify the pooling of his coal car equipment in times of car stress by reference to the plan apparently approved by the Commission in the Rail & River Coal Company case. In the McCaa case the Commission declared that this contention of the mine operator would result in the absurdity that, if the operator owned and operated mines in different parts of the country, far removed from one another, but all served by the same railroad system, he could, at his convenience, pool the allotments of his several mines in the country and have them applied to a particular mine in a particular part of the country, and declared that the "discrimination incident to such a system of distribution is too manifest to require further discussion." Each of such mines should be treated as a separate and distinct mining company for the purpose of distribution cars, and if any of such mines countermands

its order for cars on any particular day during a period of car shortage, its allotment must go back into the general supply of cars and be distributed among all the other mines on carrier's line according to their respective percentages or ratings.

McCaa Coal Company vs. C. & C. Ry. Co., 33 I. C. C. Rep. 128, 130.
Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. Rep. 86, 97.

§ 3. Car Distribution to Coal Mines; Federal Court on Mine Ratings.

The Federal Court in the well considered case of United States, ex rel. Kingwood Coal Company vs. W. V. & N. Ry. Co., et al., 125 Fed. Rep. 252, held that certain elements in the operation of a coal mine should be given careful and intelligent consideration in establishing the rating of the mine for car distribution purposes. The court said:

"It is necessary that an impartial and intelligent study of the capacity of the different mines be made by competent and disinterested experts, whose duty it should be to carefully examine into the different elements that are essentially factors in the finding of the daily output of the respective mines which are to share in the allotment. Among the matters to be investigated are the following: The working places, the number of mine cars and their capacity, the switch and tipple efficiency, the number and character of the mining machines in use, the hauling system and the power used, the number of miners and other employees, the mine openings, and the miners' houses. . . .

"The capacity of a coal mine for rating purposes is the amount of coal it is able to place in the railroad cars in a

given time, and that depends on its working places, the thickness of its coal seams, its switches, workmen, mine cars and tipples, its general equipment, and its management. The output of a mine is the amount of coal it in fact places in the railroad cars for shipment, and that is regulated by the number of such cars it is able to secure, provided its general equipment is efficient, and it may be, and generally is, less than its capacity, but can never exceed it. It is on account of these matters and those similar in character—of frequent occurrence in the mining regions—that no ironclad rule can be established with safety for the disposition of the questions we are now considering, and so it is that no separate element of a mine's capacity can be said to certainly control its output, which can in fact only be determined by the careful observation of impartial experts who have worthily and discriminatively studied and applied the conditions applicable thereto."

The federal courts have declared that under the Act to Regulate Commerce a carrier engaged in interstate commerce in determining the distributive share of cars due a particular mine must count against that mine the private and foreign fuel cars supplied to it, although such cars are used only in intrastate commerce.

Majestic Coal & Coke Co. vs. I. C. R. R. Co., 162 Fed. Rep. 810, 811.

See also—

United States, ex rel. Pitcairn Coal Co. vs. B. & O. R. R. Co., 165 Fed. Rep. 113, 125 (154 Fed. Rep. 108).
C. & A. R. R. Co. vs. I. C. C., 173 Fed. Rep. 930, 933 (reversed in I. C. C. vs. I. C. R. R. Co., 215 U. S. 452).
Penna. Refining Co. vs. W. N. Y. & P. R. R. Co., 208 U. S. 208, 222.
Oregon R. R. & Nav. Co. vs. Dumas, 181 Fed. Rep. 781, 785.
U. S. ex rel. Coffman vs. N. & W. Ry. Co., 109 Fed. Rep. 831.

See also—

Johnson Coal Mining Company vs. Hocking Valley R. R. Co., 14 Ohio 209.
State, ex rel. vs. C. N. O. & T. P. R. R. Co., 47 Ohio St. 130, 23 N. E. Rep. 928.

Compare—

W. V. & N. R. R. Co. vs. U. S., ex rel. Kingwood Coal Co., 134 Fed. Rep. 198.
U. S., ex rel. Greenbrier Coal & Coke Company vs. N. & W. Ry. Co., 143 Fed. Rep. 266.
U. S., ex rel. Pitcairn Coal Co. vs. B. & O. R. R. Co. et al., 154 Fed. Rep. 108.
Logan Coal Co. vs. P. R. R. Co., 154 Fed. Rep. 497, 498.

NOTE:—The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, are to be treated as available car equipment as a whole, distributable pro rata to shippers desiring their use along the line of the carrier, upon a basis giving each equal facilities with the other.

§ 4. Contracts for Car Supply.

Commission recognizes the right of a carrier to contract with a particular operator for its fuel supply; the right of a connecting line also to do this; and each may send its cars to those mines to the exclusion of other mines. It also upholds the owner of private cars in his exclusive use of them. But in each case the Commission holds that all such cars must be counted against the distributive share of the mine receiving them. When subjected in all its different phases to the scrutiny of the Supreme Court of the United States the position of the Commission in this respect was found objectionable either on legal or constitutional grounds.

Hillsdale Coal & Coke Co. vs. P. R. R. Co., 19 I. C. C. Rep. 356, 364.

However, if the carrier and the mine operator enter into a contract for fuel supply of the carrier which does violence to any of the provisions of the Act to Regulate Commerce, or to the decisions of the courts, or is opposed to public policy, such parties are in no better position than the parties to any other contract which violates the legal principles relating thereto. It is well settled that the carrier owes a special duty to shippers who are entirely dependent upon it for transportation facilities. Such carrier may send its equipment off its lines for things that are necessary and essential for its own operation, but such right in the carrier arises out of public policy which recognizes the duty of a carrier to operate its line and is predicated on necessity and not on the carrier's right of private contract.

Traer vs. C. & A. R. R. Co., 13 I. C. C. Rep. 451, 457.

The Federal Court in the Dumas case, *supra,* held that a contract between a carrier and a shipper by which the carrier binds itself to furnish a specific number of cars, at specified times and places, is not contrary to public policy so long as its provisions do not require the supply of cars to such shipper in such a way as to discriminate unduly against other shippers.

Oregon R. R. & Nav. Co. vs. Dumas, 181 Fed. Rep. 781, 785.

§ 5. Carriers Not Generally Required to Establish Mine Ratings for Car Distribution.

The Act to Regulate Commerce requires that the rates and regulations under which traffic is handled shall be just and reasonable, and it is the duty of the Commission, upon a showing that such rates and regulations are not lawful, to correct them, even though the aggrieved party does not show a direct pecuniary interest in its order. The law

also requires railroads, in the distribution of their equipment, not to discriminate between different shippers, and it is undoubtedly the duty of the Commission to see that such rules and regulations are adopted as will prevent that form of discrimination. There is, however, no requirement of the act that a railroad company shall establish a system of mine ratings and car distribution unless it is necessary to prevent discrimination among the different patrons of its line, and the Commission is not called upon to make an order for the establishment of such a system until it fairly appears that without it discrimination will result which can be prevented by the order.

The Act to Regulate Commerce leaves the carriers free to initiate their own rates, rules and regulations, and the Commission should only interfere when it becomes clearly necessary in order to prevent some wrong forbidden by the act.

To provide anything like an effective system of coal-car distribution upon a given railroad system of large scope would require the railroad to rate the mines upon all parts of its system and to establish a method for distributing its coal cars, first, among the different fields, and, next, among the different operations in each field. To put into effect and maintain such a system would require expenditure of time and money, but this is no reason for not requiring it, provided it is necessary and will accomplish the desired purpose, yet it must be borne in mind that no order which the Commission could make as to the rating of coal mines or the distribution of coal cars will remove all possible discrimination. There is no system of rating which is not open to some objection; there is no scheme of distribution of cars which has not some disadvantage. It may well happen that if the carrier can supply during the major part of the year all the cars required by its coal

mines, the most satisfactory basis for distribution during short and infrequent periods of car shortage would be furnished by the actual results of operation during the time of full supply.

Traer vs. C. B. & Q. R. R. Co., 14 I. C. C. Rep. 165, 168.

In this connection careful scrutiny should be made of the considerations and circumstances prevailing in those cases in which the Commission did order the establishment of mine rating basis and an equitable system of coal-car distribution. See "Car Equipment and Supply," this volume, Chaps. VIII and IX.

§ 6. Car Distribution for Fruits.

The equitable distribution of cars to shippers applies to all forms of transportation provided for in the Act to Regulate Commerce. In the California Fruit Growers' Exchange, et al. vs. Southern Pacific Co., 12 I. C. C. Rep. 553, a case in which the California Citrus Union was intervenor, the complainants represented a substantial majority of the orange growers of California, who had associated themselves together to better pick, handle and market the fruit independent of the middlemen, and who controlled approximately 90 per cent of the total crop. The intervenor represented the general jobbing and commission interests in citrus fruits. These jobbers contended for what is known as the "house rule" of distribution of cars, which, they alleged, obtained on the Southern Pacific Railway in previous years and still was in effect on the Santa Fe Railway at the time of the hearing.

The "house rule," promulgated on April 12, 1907, announced that the Southern Pacific on and after the next day would distribute cars to citrus-fruit shippers on the basis of the quantity of fruit in the packing houses.

Shippers of fruit in California have their own packing houses on tracks near railroad stations, and the fruit is shipped directly from these packing houses. This rule has been interpreted as applying to all fruit, whether packed or loose. The apportionment scheme was that the cars would be apportioned out among these several shippers at that station in accordance with the relative quantities of fruit which they have ready for shipment. This regulation was not a principle for obtaining cars; it was a question of apportionment as between freight when there was a quantity of freight offered by several shippers at a station in excess of the ability of the carrier to furnish facilities to move it. It was only a scheme of apportionment applicable when there are several shippers at a station who have offered and have ready for shipment more fruit in the aggregate than the carrier has available cars for.

Under this rule all the oranges that are in the packing house are considered as ready for shipment, and the apportionment of cars is made on such basis. No distinction was drawn between fruit that was ready for shipment and fruit that was in the packing house, because it was the universal desire of all shippers to move their fruit as soon as possible after it was picked. The railroad therefore regarded all fruit that was in the packing houses as ready and offered for shipment; and, as between the packing houses of various shippers, it apportioned the cars in time of car shortage upon the basis of the oranges in the respective packing houses of those shippers. Thus this rule comes to be known as the "house rule."

The "crop-holding rule" which obtained upon all roads prior to April 12, 1907, and which was abrogated upon the Southern Pacific line by the substitution of the "house rule," is not capable of as precise a definition and does not

appear to have taken positive form in the regulations of any of the railroads using it.

Early in the orange-shipping season the railroads estimate more or less carefully the volume of this traffic which may be anticipated. While there is some dispute as to how extensively and with what degree of care these appraisements have been made, the practice has been in vogue and it is entirely practicable to determine in advance of the first shipping of oranges or lemons how large the yield for the season will be. These appraisements may be made as to each orchard; and, as the greater number of orange growers are united into shipping associations which are in effect co-operative sales agencies, the number of shippers at each station is reduced to a minimum, averaging, perhaps, not more than five at each orange-shipping station.

The orange growers urge that the fair and reasonable rule for distribution of cars in time of shortage of equipment is the amount of fruit which each shipper has to market; and that this should be determined, not by the amount of such fruit which the shipper has deposited in his packing house, but by the amount of such fruit which he has upon his trees. Each shipper is treated as controlling the shipment of a certain volume of the traffic, and his apportionment of cars is based upon the quantity of oranges which he has to ship for the whole season. Of course, such rule is put in practice only when a shortage in cars exists. The "crop-holding rule" has always been in force on the Santa Fe Railway, but it was not observed when there were cars enough to meet all demands.

The working of the "crop-holding rule" is illustrated thus: Assume that at a certain station there are three firms doing the orange-shipping business of that station. The railroads know that one firm controls the shipment

of fifty carloads, another thirty, and another twenty carloads. They can not all be supplied with the number of cars they desire, and but ten cars are assigned to that station. According to the "crop-holding rule" these cars would be distributed to the respective parties according to their crop for the season. That is to say, A, having fifty cars to move during the season, would get one-half of the cars sent in to that station on that day, or five cars; B, having thirty cars for the season, would get 30 per cent, or three cars, and C, having twenty cars for the season, would get two cars.

The estimates upon which such an apportionment is based are revised during the season to meet any change in conditions which might arise. These estimates, being based upon the fruit on the trees, and the shipper being treated as controlling a certain volume of fruit from a certain acreage, the working rule is that the cars should follow the fruit, so that if during the season a crop from one orchard is transferred from the control of one shipper to another the proportion of cars given to the one is reduced and to the other is increased.

The "house rule" treats oranges in the packing houses as offered for shipment as a basis upon which to apportion cars. The "crop-holding rule" treats oranges on the trees as the basis for the apportionment of cars. This is the fundamental distinction between the two rules.

The main objection urged by the shippers against the "house rule" was that it compelled the grower to pick the fruit when it is not known whether cars will be available for its shipment or not.

The Commission, in speaking of these two rules of car apportionment, said:

"The 'house rule,' when rigidly enforced, tends to embarrass both shippers and carriers by drawing into houses

traffic that cannot be moved. The 'crop-holding rule,' if strictly followed, tends to exclude from shipment traffic offered and ready to move and to fix arbitrarily the equipment which may be placed for a shipper irrespective of his needs. . . .

"The railroad could be swamped with tendered fruit if it were the policy of the shippers to embarrass the carriers. For this reason the analogy as to coal-carrying roads can not be carried out as to the traffic here concerned. Coal roads in time of shortage may distribute equipment in proportion to the capacity of the mines to deliver coal, measured by their tipple capacity. A mine can not in good faith ask for more cars than it can load, no matter how great the volume of coal it can theoretically or actually mine. The railroad, by testing the ability of a mine to load cars, has an absolute standard of the mine's capacity from a transportation standpoint. But in the case of oranges the amount to be loaded varies, or may vary, from day to day with the judgment or caprice of the shippers, which may lead them to ship much one day and little another. If orange shipments were regulated automatically, as coal shipment is, there would be no difficulty in applying the 'crop-holding rule'; but manifestly such is not the condition, nor a possible condition, upon which this Commission would be justified in basing an order.

"The whole situation is one which it does not seem to us can be dealt with by any fixed, arbitrary and inelastic regulation. The carrier must accept the responsibility of carrying freight offered for shipment. We cannot protect a carrier by the installation of any rule against such responsibility and attaching liability. . . . Therefore we shall make no order in this case, for the reason, as above stated, the 'house rule' does not seem to be unduly discriminatory and therefore obnoxious to the act, although

it appears from the voluminous record in this case that the 'crop-holding rule,' as modified and suspended from time to time under the practice of the Santa Fe, more perfectly tends to the satisfaction of shippers and carriers."

California Fruit Growers' Exchange et al. vs. So. Pac. Co., 12 I. C. C. Rep. 553, 555, 557, 559, 560.

Compare similar rules applied to grain traffic in—

Board of R. R. Comrs., etc., vs. C. R. I. & P. Ry. Co. et al., 29 I. C. C. Rep. 396, 398, 399, 404.

CHAPTER XI.

CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1. Acts and Representations of Agents Relative to Distribution of Cars Binding Upon the Carriers.
§ 2. Effect of Refusal of Shipper to Accept Car Until Adjustment of Claim for Damages.
§ 3. Carriers Must Move Car Through to Destination or Transfer en Route Free.
§ 4. Return of Cars to Owner.
§ 5. Interchange of Cars.
§ 6. Car Shortages.
(1) Causes of Car Shortages.
(2) Proposed Remedies.
(3) Reconsignments.
(4) Warehousing of Cars.
(5) Proposed Car Clearing-house.
(6) Car Per Diem.
(7) Reciprocal Car Demurrage and Its Effects.
§ 7. Administrative Remedial Power of Interstate Commerce Commission in Car Shortages.
§ 8. Rulings of Interstate Commerce Commission in Connection with Car Shortages.
§ 9. Effect of Interstate Commerce Commission's Car Distribution Rules on Intrastate Shipments.
§ 10. Release of Cars.

CHAPTER XI.

CAR EQUIPMENT AND SUPPLY—(Continued).

§ 1. Acts and Representations of Agents Relative to Distribution of Cars Binding Upon Carriers.

Even though a railroad company having permitted the erection of grain elevators along its right of way for the storage of grain by producers and other owners, pending shipment, promulgated a rule requiring all orders for cars to be used in the shipment of grain from such warehouses to come through the warehouseman, such warehouseman in ordering cars for a storer of grain pursuant to such rule is the agent of the railroad company for that purpose, and not the agent of the storer, so that the railroad company is liable for the warehouseman's neglect or unlawful performance of such duty, but the act of such agent could not be superior to the law.

U. S., ex rel. N. W. Warehouse Co. vs. O. R. & Nav. Co., 159 Fed. Rep. 975.

See also, Gallogly vs. C. H. & D. R. R. Co., 11 I. C. C. R. 1, holding that a carrier is bound by what its agent says and does in the business of furnishing cars.

NOTE:—Under the act as amended, the act of the carrier's agent in this respect would not be superior to the law.

§ 2. Effect of Refusal of Shipper to Accept Car Until Adjustment of Claim for Damages.

A shipper has no right to demand a settlement of a claim for damages as a condition precedent to the acceptance of cars tendered to him in the regular course of business.

Gallogly vs. C. H. & D. R. Co., 11 I. C. C. R. 1.

§ 3. Carriers Must Move Car Through to Destination or Transfer en Route Free.

It is both the letter and spirit of the regulatory laws that the continuity of interstate shipments shall not be violated by the effect of restrictive car movement regulations. Where connecting lines have united in publishing a joint through rate between two points it is the rule of the Commission that it is the duty of the carriers in the route to provide the car and permit it to go through to destination or to transfer the property en route to another car at their own expense.

Conf. Rulings Bull. No. 6, Ruling No. 59, April 7, 1908.
St. L. S. & P. R. R. vs. P. & P. U. Ry. Co., 26 I. C. C. Rep. 226, 237.

See also—

I. C. C. Conf. Rulings Bull. No. 6, Rulings Nos. 250, 273, 274, 331, 339, and 357.
Act to Reg. Com. (Amd. 1910), Sect. 1.

§ 4. Return of Cars to Owner.

The return of equipment to its owner is required by the language of the amended first section of the Act, "to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein (through routes), and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto."

Act to Reg. Com. (Amd. 1910), Sept. 1, Par. 2.

§ 5. Interchange of Cars.

It is the specific requirement of the Act to Regulate Commerce that carriers shall maintain and operate through routes and interchange and exchange cars between them-

selves under reasonable rules and regulations, providing reasonable compensation to those entitled thereto. It is the universally recognized rule that the initial carrier in a through route shall furnish the necessary cars for shipments originating on its line and destined to move over such route, but the burden likewise rests upon all carriers constituting the through route and must be effected under reasonable rules and regulations for the exchange and interchange of cars between such carriers. So, carriers must transport private cars under reasonable regulations and without discrimination between the owners thereof lawfully entitled to such transportation.

The law holds the common carrier bound to accept a car for transportation whenever such a car is offered to it at a place where it can reasonably receive it. It is not the right of the carrier to inquire into the ownership of the car, nor into the origin of the shipment it contains, nor into the route over which the car has moved to reach its rails. At most such carrier can only ask for reasonable compensation for the service it performs, and at all times hold itself a party to reasonable regulations for the exchange and interchange of its equipment with other carriers in the route and to induce the prompt return of its equipment by foreign lines.

Refuse Cotton Oil Co. vs. St. L. I. M. & S. Ry. Co., 27 I. C. C. Rep. 117, 120.
St. L. S. & P. R. R. vs. P. & P. U. Ry. Co., 26 I. C. C. Rep. 226, 237.
Follmer & Co. vs. C. P. Ry. Co., 26 I. C. C. Rep. 512, 513.
Spiegle vs. So. Ry. Co., 25 I. C. C. Rep. 71, 75.
National Lumber Expr. Assn. vs. K. C. S. Ry. Co., 25 I. C. C. Rep. 78, 84.
Wichita Board of Trade vs. A. T. & S. F. Ry. Co., 25 I. C. C. Rep. 625, 631.
Colorado Coal Traffic Assn. vs. C. & S. Ry. Co., 24 I. C. C. Rep. 618.

Colorado Coal Traffic Assn. vs. D. & R. G. R. R. Co., 23 I. C. C. Rep. 458, 460.
Missouri & Illinois Coal Co. vs. I. C. R. Co., 22 I. C. C. Rep. 39, 49.
Chappelle vs. L. & N. R. R. Co., 19 I. C. C. Rep. 56, 58.

§ 6. Car Shortage.

Provided the ruling of the Interstate Commerce Commission in the Paraffine Works case is finally upheld by the courts, or Congress by appropriate action removes the doubtful deficiency in the Commission's authority to compel carriers subject to the act to acquire sufficient equipment to handle their normal business, much will have been accomplished to remove the scourge of car shortage which has so periodically visited its woe upon the commerce of the country. The Commission's jurisdiction is devoid of authority to control the physical operation of a railroad, but its power so to regulate the facilities of transportation as to prevent undue discriminations and compel the furnishing by the regulated carriers of the "transportation" defined in the act upon reasonable request cannot be reasonably questioned. In fact, the intelligent and effective policies of the Commission in dealing with car shortages in the past has done much to minimize these disastrous occurrences in the last two or three years.

(1) Causes of Car Shortages. In 1906 this country experienced one of its most disastrous car shortages, with a resultant coal famine in the Northwest. The Interstate Commerce Commission's attention was first directed to a coal famine in North Dakota, and instituted a general investigation, which eventually led to an investigation of car shortage and other insufficiency of facilities in the Northwest, on the Pacific Coast, and in the Southwest. It investigated the grain situation in the Northwest, and con-

ducted extended hearings at Chicago and at other western points. The Commission found:

"The testimony of all the railroad officials of the two great transcontinental lines from the Lakes to the Pacific given in explanation of the non-movement of grain and of coal was that they were not so much unable to furnish cars and locomotives as they were unable to handle the volume of traffic which was offered them, and in this respect they did not regard their condition as unique. Theirs was a plea in confession and avoidance. They were engaged in great enterprises of improvement which would do much toward relieving the situation another season. They could suggest no remedy for the condition prevailing, save such a scheme of multiplying tracks and enlarging terminals as would permit a freer movement of trains.

"Many credible witnesses who appeared at both Minneapolis and Chicago gave testimony that a great and immediate improvement in transportation service in the Northwest might be effected by a change in the methods of use of present equipment without waiting for the enormously costly and practically unattainable improvements suggested by railway officials. The Commission was told of loaded cars standing from two to twenty days at the points of origin; of empty cars lost in congested terminals or lying unused, sometimes in solid trains, for equal lengths of time; of engines broken down from overwork; of trains torn in two by heavy loads; and of train crews working extremely long hours without rest, although making only ordinary mileage. Grain receivers at Minneapolis and Duluth presented long lists of loaded cars that had been twenty or more days in moving 250 miles, and that at Duluth had again been delayed days and even weeks in switching after arrival.

"All the officials and employees of the Great Northern

and Northern Pacific roads giving testimony agreed in saying that engines were not loaded too heavily and that a lightening of train loads would not aid them to give better service. Yet one of these same officials also testified that any increase in train tonnage would be likely to be followed by the breaking of trains, and another added strength to the conclusion that tonnage rather than speed is the result sought by testifying that from ten to fifteen days is a reasonable time for a car of dead freight to move 350 miles passing through two division points.

"Vice-President Pennington, of the 'Soo' road, took direct issue with this theory of railroading, saying that in periods of congestion he found the wise plan to be to reduce train tonnage, thus making better speed, increasing engine mileage, and actually moving more tons of freight in a month without increasing the equipment. Similar testimony was given by a number of experienced railroad men at the Chicago hearing. Two theories of railroad operation were thus brought into opposition.

"To many witnesses at both Minneapolis and Chicago it was obvious that if cars were made to move faster and were kept moving their efficiency would be greatly increased. Car shortage, in other words, may result as much from lack of wise methods in handling the cars which a company possesses as from a deficiency in the number of cars or a lack of tractive power. If engines are made to haul their maximum, it is manifest that their capacity is limited to the highest grade over which they are compelled to pass. If trains are made up of so large a number of loaded cars that the engine is reduced to its minimum speed, these cars during their time of transit are withdrawn from the general car supply. From the statistics presented it would appear that the policy of hauling maximum loads on long hauls is one that produces dazzling

figures of ton-mileage which should greatly gratify the railroad stockholder did not the troublesome problem arise of the carrier's duty to render prompt service and make the fullest possible use of the railway and its facilities. Maximum tonnage and maximum service are not necessarily equivalents. A railroad which lives by virtue of a public grant and the exercise of quasi-public powers is primarily obligated to discharge its function with an eye to the welfare of the public which it serves and to avoid any policy of operation which, no matter how profitable to the stockholder, may result injuriously to its dependent communities.

"The inquiry into car shortage, so far as it affected the movement of grain in the Northwest, justifies these conclusions:

"1. The Great Northern and Northern Pacific roads did not suffer by reason of diversion of their cars to other roads; the balance between these and other railroads was in favor of the Great Northern to the extent of 2,000 cars and of the Northern Pacific to the extent of 6,000 cars.

"2. Both roads had more equipment than they had last year, when cars were furnished more promptly, better time was made, and less complaint was made by shippers.

"3. There was less evidence of inability to supply cars for loading at competitive points than at non-competitive points.

"4. Preference was shown to classes of freight calling for a long haul.

"5. The elevators at terminals made no delays in freeing equipment.

"6. From the standpoint of public service the best possible use of equipment is not secured by a policy of operation which subordinates time of transportation to tonnage transported.

"7. Improvements under way and contemplated will greatly enlarge the capacity of the roads to handle their growing volume of freight, but such improvements will not relieve the needs of the Northwest unless the roads pursue a policy of operation aimed specifically to meet the needs of the grain raiser.

"The evidence taken at Chicago related to conditions at such widely separated points as San Francisco, Galveston, New Orleans, Chicago, the Western Virginia coal fields, the grain fields of Iowa, Nebraska, Kansas, and Oklahoma, and the lumber-producing regions of Oregon, Washington, and the various Southern States. Dealers in coal, grain, and lumber, whose operations extend throughout the country, were present to testify, and all told the same story of failure of transportation facilities and resulting commercial embarrassment and loss.

"It was shown that mines in several States have been closed or have operated to only a portion of their capacity for lack of car service to carry away the coal, just as elevators in North Dakota have been closed for lack of cars to take away their wheat and bring in coal.

"Testimony as to conditions in the Southwest showed that in Indian Territory and Oklahoma wheat and cotton are lying on the ground at the railway stations exposed to the elements, while the terminal at Galveston, to which this grain and cotton should go, is so congested with loaded cars that ships in the harbor are greatly delayed in securing cargoes.

"Immediately prior to the hearing at Chicago, inquiries were addressed on behalf of the Commission to grain dealers at 175 Iowa towns, asking for a statement of conditions during the present crop year, and the effect of failure of car service, if any, upon financial returns to grain buyers and farmers. At the hearing replies to these

inquiries were received from 150 towns. These replies were practically unanimous in saying that the car supply is fair at competitive points. At non-competitive points, however, much complaint of failure of car service is made, the estimates of losses from these causes made by the dealers running from $500 to $5,000 each for the present crop year. It is of course evident that these losses must finally be borne by the farmers, as in bidding for grain the dealers necessarily take into account all difficulties and expenses of storing and marketing the grain. The inference raised by these replies, that the railroads discriminated in favor of competitive points, is strengthened by direct testimony to that effect from witnesses whose duties require that they shall know the conditions throughout the State of Iowa.

"Slowness of movement of cars after being loaded is also cause of complaint from many of these Iowa points. Time of movement of loaded grain cars from Iowa points to Chicago was shown to be from two to twenty-five days. Very few cars reached Chicago in so short a time as two days, and very few consumed as much as twenty-five days. The bulk of the movement seems to take from four to eight days, yet many cars were from ten to eighteen days from Iowa to Chicago. Complaint is made that much damage to grain is caused by slow movement, especially to corn, which heats and spoils. A few replies from points in Illinois to the same questions sent to Iowa were also received. These show that conditions are much alike in the two States.

"The great grain dealers of Chicago repeated this complaint of slowness of movement of grain to their elevators, both in the journey to the city and in the switching operations after reaching the city. To this complaint these grain merchants added that shipments of grain from Chi-

cago to Atlantic ports are greatly delayed in starting for lack of car service, and are again subject to such unprecedented delays before reaching the ship's side that the selling of grain on contract for delivery at the seaboard is greatly interfered with.

"Representatives of the lumber mills of the entire country as well as of the retail lumber dealers told the same story. This industry, which pays to the railroads a total of over $170,000,000 a year in freights, seems to be an especial sufferer from the prevailing lack of car service. At every point mills find it impossible to run to capacity for the reason that they are unable to move their products. Mills of the Southern States as well as of Oregon and Washington are working short time or closed down entirely, while building operations in many States are delayed for lack of lumber. All this is a serious loss to owners and employees, and in some cases the testimony went so far as to show that failure to secure needed transportation facilities has placed substantial concerns of fair financial strength in danger of bankruptcy.

"Testimony received at Chicago and at Minneapolis, as well as reports reaching this Commission from various other points, give reasonable basis for the statement that the competition for cars between shippers is being used by minor employees of many railroads as a means of petty graft.

"At the Minneapolis hearing the notable feature was the fact that railway managers and shippers were in substantial agreement in their testimony as to the failure of the railways to measure up to the demands of the communities dependent upon them. Such conflict as appears in the testimony relates to the responsibility for an admittedly insufficient service on the part of the railroads reaching Minneapolis and Duluth from the Northwest.

"At Chicago no such agreement appears in the testimony as to the service rendered by the railways reaching that city. The railway managers were generally of the opinion that their roads were measuring up to the requirements of the shippers with reasonable success. The testimony of shippers of grain, coal, lumber, and other commodities, however, told of a failure to secure cars when needed and of slowness of movement of cars when once secured and loaded. A fair conclusion from this conflict in the testimony appears to be that railroad managers and shippers have widely-varying ideas as to what constitutes satisfactory service by a common carrier.

"The testimony showed such delays to loaded cars in being switched to points of unloading in Chicago and in passing through Chicago, for shipment out to other cities, as would explain much of the failure of car service in that territory. Figures submitted by the largest receivers of grain at Chicago show that the average length of time required for switching loaded cars to the elevator after notice of destination is received by the railroad is from three and one-half to five days, and for carload freight to be switched through Chicago takes from eight to fifteen days."

(2) **Proposed Remedies.** In the Car Shortage Investigation the Commission gave exhaustive attention to the possible remedies for car shortages. In its report the Commission said:

"Shippers generally demand that some remedy shall be found for the unfortunate condition which prevails. Those proposed vary from the all-inclusive proposition of Mr. Hill that the railroads of the country must invest over $5,000,000,000 for the enlargement of facilities upon roads now existing, to the enactment of a law by Congress which shall compel the payment by railroads of a penalty for each

day's delay in furnishing cars and in transporting cars after loading.

"Between these two extremes are various propositions involving either concerted action by the railroads, new legislation, or the expenditure of large amounts of money in betterments and equipment. There is no division among railroad men, so far as appears, as to the necessity for greatly increasing terminal facilities and for adopting new methods of handling freight at the larger terminals. The congestion of traffic arises not at points of origin, but either at points of destination or at the terminals where freight is transferred from one line to another. This congestion has its effect upon all lines of railroad reaching such terminals, for once a terminal contains more traffic than it can promptly handle and deliver, it acts as a dam which floods a constantly increasing area behind it.

(3) Reconsignment. "One of the causes of congestion at terminals is the reconsignment privilege granted on many of the principal articles of freight. This is of great value to shippers; and what is here said is not intended to in any sense lessen the extent to which such privilege is granted in necessary cases; but it is manifestly unjust that the consignee at the terminal should be unable promptly to receive his freight because traffic that is destined elsewhere encumbers yards and tracks. This is not a slight nor an insignificant cause for the slow movement of freight and shortage in car service, and it appears readily possible for the railroads and shippers to remedy this condition if they will.

"A considerable body of this traffic never should require reconsignment. It has become a practice on the part of many shippers to bill their freight to a reconsigning point as a matter of convenience to themselves without respect to its necessity. This may be checked by the shipper of

his own motion, or where the shipper desires reconsignment, and the law does not interfere therewith, the railroads may discourage it by the imposition of a reasonable reconsignment charge or by limiting drastically the time allowed on reconsignment. Or the railroads may—and the reason for such a plan is becoming emphasized more strongly every day at all of the larger terminals—provide separate terminals outside cities at which freight may be held pending determination by the shipper as to destination.

"It was the opinion of the leading operating official of a western road that it is impossible to put into effect a general rule limiting the time allowed for reconsignment because competition for traffic between carriers would prevent its common adoption and enforcement. It was his opinion that some superior authority should make the rule fixing such time limit, which should be imposed universally and which it should be an infringement of law to disregard.

(4) Warehousing in Cars. "There are other questions affecting operation upon which it would be advisable that a uniform policy should be adopted between the railroads, notably as to the time granted for the unloading of cars by consignees. This privilege, it has been contended, is one of the most fruitful causes of car shortage. Such contention, wherever examined into in this inquiry, has been found to be without support. The demurrage accounts of the railroads show that to a very limited extent do consignees avail themselves of the right to hold cars as warehouses and pay demurrage thereon. The railroads themselves, from lack of facilities, warehouses, platforms, and the like, are, however, compelled to make far too extensive use of cars for storage purposes. In one port terminal a

daily average of 10,000 cars were so held during several months of last year.

"There is, it would appear, little necessity for so extensive a time limit for unloading as is often granted. The grain elevators at Chicago promptly met the charge that they were to blame for car shortage by reason of delays in unloading by showing from their books that over 90 per cent of the cars delivered to them were emptied the day of delivery, and that all their cars were unloaded within forty-eight hours, thus indicating that an allowance of greater time than two days was unnecessary. The coal men, who were allowed five days' free time, conceded that an allowance of forty-eight hours would be reasonable.

"If it be true that any considerable part of the shortage of car service from which the country is suffering is due to the excessive and unnecessary time allowed by railroads, it is manifestly within the power of the railroads themselves to correct such abuse. If the railroads, either through fear of losing traffic to each other or through indifference or inability, do not enact and enforce the needed rules, they will not be able to reasonably object should power to make such rules be vested elsewhere. It is to be preferred that the railroad managements should regulate themselves in such matters rather than impose the task upon the Government, and it is to be hoped that they will promptly find a way to do so.

(5) **Proposed Car Clearing-House.** "While it has been found that perhaps all of the railroads whose representatives appeared at this hearing are suffering from an inability to supply cars promptly, it has not been demonstrated that, taking all roads together, there is an actual shortage of cars for the service required. It is the contention of men most conversant with existing equipment that there is a sufficient supply of both cars and locomotives to meet

present demands were such a plan adopted as would permit a free interchange of cars between railroads and an arbitrary and common control of all equipment in its handling and distribution. This is the plan suggested by Mr. John W. Midgley, of Chicago, and is commonly known as the car-pooling scheme, or more properly the car clearing-house. It has the endorsement of such men as Mr. Stuyvesant Fish and Mr. E. H. Harriman, and is in use upon the various lines comprising the Pennsylvania Railroad System, the New York Central Lines, and the Southern Pacific System, but as yet no two systems have seen fit to adopt it and subject the control of their equipment to a common directing official.

"A plan that works well for a single large system should be found practicable if extended generally. Its successful operation involves difficult problems, but with a realization of the imperative need for some system by which the activity of cars can be stimulated it is idle to say that the proposed plan could not be made effective. Such a plan, beneficial as it would be if carried out efficiently, must depend upon the agreement and co-operation of the railroads, and the time is at hand when some such modern and progressive method of furthering railroad service must be adopted.

(6) Car Per Diem. "In connection with the question last treated it is to be noted, and that with some emphasis, that one of the problems which the railroad that desires to deal honestly by the public has to meet is the dishonesty of its fellow-carriers. 'Car appropriation' between carriers does not seem to be regarded as dishonorable, nor even looked upon with great disfavor.

"It is not many years since the railroad which originated freight transferred at its junctions to the cars of the connecting road. Each railroad was thus made to supply its

own equipment. This was an uneconomical and time-wasting method, and so out of their own necessities and to give a prompter service the railroads developed the practice which generally obtains today of permitting cars to pass onto the tracks of their connecting roads and making a per diem charge therefor. Under this system the present method of hauling freight over several connecting lines has made possible that great body of through transportation which is perhaps the most distinctive feature of American railroading. Experience has proved, however, that the rules governing the return of cars were evaded to such an extent that not a few railroads relied upon foreign equipment for their own needs.

"Realizing that a charge of 20 cents per day was insufficient penalty, over 100 railroads within this month have raised the per diem to 50 cents. That this will be effective in securing return of cars to the owning railroads during the few months of the year when traffic is light may be conceded, but that it will insure return during times of great need is not likely, for in such times the holder could earn perhaps ten times the amount that he would be compelled to pay by using the foreign car.

"A rule might be adopted fixing a minimum of 50 cents per day during those months of the year when traffic is light, and increasing this possibility fourfold during the latter half of the year, when cars are most needed.

"While the railroads may fix the price that shall be charged for the use of their cars by other roads, it may become advisable for the protection of those roads which, realizing their duties as common carriers, furnish themselves with adequate equipment, that power be vested in this Commission to make rules governing the interchange of cars and that Congress also enact a penal law under which railroads may be punished for confiscation of foreign

equipment. It is submitted that the carriers themselves cannot deal with this problem by raising the per diem charge without seriously limiting the extent and utility of through transportation, a contingency that would demoralize the business of the country. That this matter of securing the return of cars to their owner is not one to be regarded indifferently is made evident by the fact that railroads having 10 per cent of the total mileage in one of the states rely 'entirely' for equipment upon foreign cars.

(7) **Reciprocal Car Demurrage, and Its Effects.** "The most generally advocated remedy for the failure on the part of carriers to furnish cars when demanded is that now generally known as 'reciprocal car demurrage.' This phrase means, in a word, that carriers shall be penalized upon failure to furnish cars demanded, and the phrase arises out of the universal railroad practice of imposing a per diem penalty when a car is held for unloading beyond a certain fixed number of days.

"It is but equitable, the shipper urges, that if the railroad may charge me for holding its car because that car is needed by it in the conduct of its business that I should be permitted to charge it a stated sum per day when it fails to deliver to me a car which is necessary to the conduct of my business.

"The carrier disavows any intention to profit by the delay of the consignee in unloading his freight, but justifies its demurrage rule upon the ground that only by such charge can the consignee be led promptly to free equipment. The shipper in turn urges that such reciprocal demurrage as might be exacted would not compensate for the loss of the car at the time needed, but is intended rather to stimulate the railroad into more promptly providing the car which it is its legal duty to furnish.

"Some commercial bodies, advocating this general principle, favor the enactment of a law by Congress dealing directly with the subject, while others favor an enlargement of the powers of the Interstate Commerce Commission under which this body shall have authority to make proper and necessary rules, which may be enforced through the courts under penal provisions similar to those now incorporated in the act to regulate interstate commerce. Each method of procedure has been followed in the legislation of the states. The statute of Texas is an illustration of one method, and the rules framed by the commissions of Louisiana, Florida, Mississippi, North Carolina and Virginia are illustrations of the other.

"It is to us evident and beyond all controversy that the difficulties with which the business of transportation is affected in this country at the present time would not be overcome by the enactment of a reciprocal demurrage bill alone if such measure merely provided for punishing the railroad for non-placing of cars or non-movement thereof. The problem is one much deeper and much broader than a mere lack of cars and engines. No doubt an inadequate supply of these facilities is the cause of all the troubles which beset the shipping public on certain lines. But these instances are few. The problem of car shortage is one in which is involved every factor in railroading—the construction, the operation, the maintenance and the financing of the railroads. The inability of the shipper to secure a car may be but a symptom of a deep-seated and organic trouble.

"The real cause of car shortage may lie in the too conservative character of the management of the road or in the unfitness and incompetency of its operating officials. It may flow from an incomprehension on the part of the directors of the full duty imposed by law upon a common

carrier. It may arise out of a policy in railroad operation which gives primary consideration to speculative stock operations. It may come from an inability to secure funds to so fit itself that it can discharge its duty. It may follow in a time of exceptional prosperity from an increase in traffic which could not reasonably have been anticipated. Or it may result from an inability to secure labor and materials necessary to the proper enlarging of the railroad's facilities. This enumeration of causes is not exhaustive. It could not well be complete without giving consideration to many industrial and economic factors which at first glance would appear remote and unrelated. Clearly the problem of transportation is so closely interwoven with the fabric of our commercial system, and so closely related and so interdependent are the various activities of our industrial life that one may not lightly say what are the multitudinous considerations which necessarily enter into so simple a question as the reason why a railroad car is not at once forthcoming when ordered.

"The enactment of a reciprocal demurrage bill will not build railroad track, equipment, enlarge and simplify terminals, nor transform incompetent operating officials into first-class railroad men, but it might stimulate, energize and in some cases revolutionize the methods of delinquent railroads so that they would render the service which they were created to render. This is the theory of reciprocal demurrage. But that of itself it will enable the railroads to render adequate service is not demonstrated by experience.

"Throughout this inquiry the thought has repeatedly suggested itself that many of the problems presented must rest for their solution in the character and intelligence of the railroad managers—their foresight, initiative,

adaptability and public spirit. If it be true, as railroad men have said, that the railroads have not kept pace with the growth of the country, it must be remembered that it is within the right of a private enterprise to restrict its obligations to its known capacity without becoming subject to the slightest criticism, whereas the measure of a common carrier's obligations is undetermined and without limitation save in the demand of the public for transportation. Whatever of criticism, therefore, is to be expressed should in justice be tempered by a consciousness of the novel and perhaps unparalleled difficulties which the problem of American railroad transportation today presents.

"This demand, however, the shipping and producing public is certainly justified in making—that every railroad shall do its utmost, not alone in and of itself, but by community of action with other roads, to render the service which is imperatively needed, and shall act in supreme good faith in endeavoring to organize and equip itself for such service. Methods which were sufficient to fully meet the needs of the largely localized traffic of a few years since are at this time properly subject to re-examination. Policies which hitherto have sufficed, if found satisfactory to the most exacting of stockholders, should now be reconsidered with respect to the requirements of new conditions and much broader considerations. The most conservative critic must hold that proper co-ordination of departments within individual roads and intelligent co-operation between independent roads, within entirely lawful lines, would leave less foundation for criticism of car service than may at present be justly made."

To this exhaustive consideration of the evils of car shortage, Commissioner Harlan supplementally said:

"The efficacy of the proposed reciprocal demurrage legislation was not satisfactorily demonstrated by the wit-

nesses who appeared before us. In my judgment, such a measure ought to have very full consideration before being enacted. It seems not improbable that if the railroads are penalized by federal legislation for failing to supply cars for interstate commerce the local commerce of the states in times of stress may be wholly neglected by the carriers in order to avoid such penalties, unless the federal legislation is promptly followed by state legislation of the same nature. Such legislation without providing also for the compulsory interchange of cars would tend to compel carriers to keep all their cars on their own tracks in order to avoid demurrage penalties, and thus break up the advantages now enjoyed by shippers of through transportation. Some railroad men of prominence appearing before us seemed to think that the more effective regulation of the interchange of cars by carriers would of itself go far toward remedying the present car shortage. There seem to be strong reasons for thinking that the proposed car pool or car clearing house would result in a more effective car service. If some such adjustment cannot be reached by the companies themselves, it may be that legislation will become desirable and necessary."

In the Matter of Car Shortage and Other Insufficient Transportation Facilities, 12 I. C. C. R. 561, 562 et seq.

§ 7. Administrative Remedial Power of Interstate Commerce Commission in Car Shortages.

In the Vulcan Coal and Mining Company (33 I. C. C. Rep. 52) and Paraffine Works (34 I. C. C. Rep. 179) cases the Commission, in its majority report, declared itself possessed of authority to require a regulated carrier to so increase its complement of equipment as to meet the requirement of the act to furnish "transportation" upon reasonable request by shippers and thus is was empowered

to deal with the causes of car shortages in so effective a manner as to minimize their occurrence.

In the amendment of 1910 to Section 1 of the Act to Regulate Commerce, the Commission was charged with the enforcement of the requirement that carriers should "provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein." The language of the statute is that the carriers are required to "make reasonable rules and regulations with respect to" the interchange of equipment, and the Commission's power, in the failure of the carrier to make such reasonable rules, would be directed toward compelling the carrier to make such reasonable rules. But whether this power in the Commission is sufficiently comprehensive to enable it to require a connecting line to give to an initial line cars to make up for those sent off its line under a through route has not yet been asserted by the Commission nor so interpreted by the courts. Under the usual rule of construing a statute of this kind, the Commission should exercise such authority under the statute as now amended.

Nor would this construction of the statute interfere with prior holdings of the Commission that in the absence of an agreement no connecting carrier is obliged to furnish cars to take shipments from points of origin on another carrier's line, since no through route can exist without the proper concurrence and agreement between the carriers composing such through route. The point was raised that the agreement whereby a through route is established does not include any greater duty on the part of the carrier in the furnishing of equipment for the reception of freight at points on another carrier's line than the duty the carrier

owes to the shipper to preserve continuity in the carriage of his shipment.

Sec. 1 of Act to Reg. Com. (Amd. 1910).
Am. Nat. Live Stock Assn. vs. T. & P. Ry. Co., 12 I. C. C. R. 32.
Cedar Rapids, etc., Ry. & L. Co. vs. Chicago & W. Ry. Co., 13 I. C. C. R. 250.
Memphis Frt. Bu. vs. Ft. Smith, etc., R. Co., 13 I. C. C. R. 1, 8.

§ 8. Rulings of Interstate Commerce Commission in Connection with Car Shortages.

The Commission holds it to be the carrier's duty to maintain a reasonably adequate car supply, and the question of what is a reasonably adequate car supply is just as much an administrative one as the question of what is a reasonable rate. However, the utmost obligation that the law lays upon a carrier is to equip itself with sufficient cars, not to meet the hopes and expectations of the shipper, but to meet his actual shipments.

In the Paraffine Works case the Commission, aside from the equitable distribution order entered, declared its authority to compel the carrier to acquire necessary additional equipment to meet the demands of its shippers, thus invoking a principle which, if carried out to its reasonable scope, would tend to entirely eliminate car shortages.

In connection with the majority decision of the Commission in the Paraffine Works case it is well to give consideration to the minority report of Commissioners Clark, Clements and Harlan, who expressed themselves as of the opinion that the provisions of the Act to Regulate Commerce in Section 1 do not enlarge the obligations or duties laid upon the carriers in this respect by the common law, but amount to simply the incorporation in the Act of a declaration of the common law duty of the carriers as

a foundation for the exercise of the powers conferred upon the Commission by the Act. The dissenting opinions are as follows:

Clark, Commissioner, dissenting:

"I am unable to agree with the conclusions reached by the majority. I do not think that the enactment of the provision of Section 1 of the act, 'and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor,' enlarged the obligations or duties laid upon the carriers in this respect by the common law. It seems to me to have been the incorporation in the act of a declaration of the common-law duty of the carriers as a foundation for the exercise of the powers conferred upon the Commission by the act. The terms 'railroad' and 'transportation' are defined in Section 1 in terms which are and were intended to be inclusive of all of the carrier's transportation facilities that are subject to regulation under the act. Section 15 enumerates various powers that are conferred upon the Commission, and provides that that enumeration shall not exclude any power which the Commission would otherwise have under the provisions of the act. Section 20 specifies certain liabilities which shall rest upon the carrier in the event of loss of or damage to property received by it for transportation, and provides that nothing in the section shall deprive the holder of the carrier's receipt or bill of lading of any remedy or right of action which he has under existing law. There is no language in Section 1 which indicates a legislative intent to expand the common-law duty of carriers to furnish facilities for transportation.

"The majority report in the instant case reasserts the possession by the Commission of powers that were asserted in the majority report in Vulcan Coal & Min-

ing Co. vs. I. C. R. R. C., 33 I. C. C. 52. If the act confers upon the Commission power to order a carrier to enlarge its complement of cars and to award damages against it if it fails to comply with such order, it seems logically and necessarily to follow that the Commission has the same power to order enlargement of terminal facilities, increase in the number of locomotives and extension of tracks or branches. In fact, no facility of transportation is exempt. I think that this power is vested in the courts and not in the Commission. For the reasons that were more fully stated in the dissent in the Vulcan Coal & Mining Co. case, *supra,* I am not able to accept the views of the majority on this point.

"There can be no question of the right and power of the Commission to so regulate the use of the facilities possessed by the carrier that there shall be no unjust discrimination. Plainly the shipper should not be required to deal with any other then the carrier in contracting for and receiving transportation, and such was plainly the intent of the Congress when all of the facilities were made subject to the act, regardless of ownership thereof. I, of course, agree that the carrier may provide facilities by purchase, lease or rental, and that by whatever means they are acquired by the carrier the shipper has a right to demand the use thereof and service therefrom without unjust discrimination against or undue preference in favor of any.

"Commissioner Clements requests me to say that he concurs in this dissent."

Harlan, Commissioner, also dissenting:

"I concur in the general thought underlying the dissenting report herein by my brother Clark, namely, that the language in the act upon which the majority report is largely based is simply declaratory of the general duty of

carriers at common law to furnish such cars and other facilities as are reasonably necessary to enable them to fulfill their public obligations, but does not impose upon this Commission any such administrative duty or any such jurisdiction and power as are asserted in the majority report and in the order accompanying it."

The power vested in the courts under Section 23 (amendment of 1889) of the Act to Regulate Commerce to issue peremptory mandamus, upon the condition that such remedy should be cumulative and not exclude or interfere with other remedies provided by the act, was early invoked to enforce through routing, but the issue was unsuccessfully maintained in the courts. This remedy by writ of mandamus was, however, successfully invoked to prevent unlawful discriminations in car supply. (See cases cited in Note 1 at conclusion of this section.)

In 1909 the Supreme Court of the United States in the Baltimore & Ohio case (215 U. S. 481) denied the further efficacy of the remedy provided in Section 23. The court held that mandamus was no longer the proper remedy in such case because of the very comprehensive enlargement of the power of the Commission in the several amendments enacted to the act, thus removing the remedial effect of Section 23 which had been specifically enacted to cure the remedial deficiency of the act. It was held that discriminatory practices in the distribution of cars during periods of car shortage was within the peculiar administrative jurisdiction of the Commission for investigation, the proper procedure, therefore, being to make complaint to and demand investigation through the Commission, thus overruling the prior decisions of the courts under Section 23.

The decisions of the Commission in its investigations invoking car shortages since the investigation in 1906 have

been notable in an effort to assist the shippers and carriers in bringing about a mediative co-operation permitting greater efficiency in the use of railroad equipment and transportation facilities and the removal of harmful discriminations so often visited upon the shippers in the past. The Commission has sought to level conditions and to bring to both shipper and carrier a fuller realization of their respective parts in the fulfillment of the letter and spirit of the regulatory laws in harmony with unusual commercial and transportation conditions of the country.

While much improvement in car distribution to shippers has been realized through the Commission's efforts, the ideal situation has not been reached, for car shortages under prevailing commercial and transportation conditions seem inevitable.

Car shortages usually reflect territorial conditions, for experience is that when one line is short of cars all lines in the same general territory are similarly affected.

In summary of its many efforts to prevent car shortages and alleviate the resultant injury to commerce, no more wholesome and remedial rule has been pronounced by the Commission than that shortages in equipment due to the tender of a large volume of a particular traffic within a limited period may, to a large extent, be prevented if the carriers are afforded full knowledge of the shippers requirements. So, too, the Commission has visited upon all carriers parties to a lawfully established through route to share in the burden of providing the required equipment for the reasonable operation of the through route.

Penna. Paraffine Works vs. P. R. R. Co., 34 I. C. C. Rep. 179, 193.

Farmer's Co-operative Assn. vs. C. B. & Q. R. R. Co., 34 I. C. C. Rep. 60.

Vulcan Coal & Mining Co. vs. I. C. R. R. Co., 33 I. C. C. Rep. 52, 64.

Wabash Sand & Gravel Co. vs. V. R. R. Co., 31 I. C. C. Rep. 344, 345.
Coal & Oil Investigation, 31 I. C. C. Rep. 193, 217.
Royster Guano Co. vs. A. C. L. R. R. Co., 31 I. C. C. Rep. 458, 461.
Pittsburgh & S. W. Coal Co. vs. W. P.-T. Ry. Co., 31 I. C. C. Rep. 660, 663.
Rental Charges for Insulated Cars, 31 I. C. C. Rep. 255, 256.
Co. N. W. Reconsignment Rules, 29 I. C. C. Rep. 620, 624.
Huerfano Coal Co. vs. C. & S. E. R. R. Co., 28 I. C. C. Rep. 502, 504.
National Coal Co. vs. B. & O. R. R. Co., 28 I. C. C. Rep. 442, 444.
Lumber Rates from Memphis, etc., 27 I. C. C. Rep. 471, 478.
Coal Rates on the Stony Fork Branch, 26 I. C. C. Rep. 168, 177.
In re Mine Ratings, 25 I. C. C. Rep. 286, 291.
Consolidated Fuel Co. vs. A. T. & S. F. Ry. Co., 24 I. C. C. Rep. 213, 219.
Colorado Coal Traffic Assn. vs. C. & S. Ry. Co., 24 I. C. C. Rep. 618, 619.
Colorado Coal Traffic Assn. vs. D. & R. G. R. R. Co., 23 I. C. C. Rep. 458, 463.
Hillsdale Coal & Coke Co. vs. P. R. R. Co., 23 I. C. C. Rep. 186, 189.
Jacoby & Co. vs. P. R. R. Co., 19 I. C. C. Rep. 392, 394.
Peale, Peacock & Kerr vs. C. R. R. Co. of N. J., 18 I. C. C. Rep. 25, 35.
American Creosoting Works vs. I. C. R. R. Co., 15 I. C. C. Rep. 160, 162.
Rail & River Coal Co. vs. B. & O. R. R. Co., 14 I. C. C. Rep. 86.
Cox Bros. vs. St. L. & S. F. R. R. Co., 14 I. C. C. Rep. 464.
Traer vs. C. B. & Q. R. R. Co., 14 I. C. C. Rep. 165.
Royal Coal & Coke Co. vs. Soky Co., 13 I. C. C. Rep. 440.
Traer vs. C. & A. R. R. Co. et al., 13 I. C. C. Rep. 451.
Ruttle et al. vs. P. M. R. R. Co., 13 I. C. C. Rep. 179.
England & Co. vs. B. & O. R. R. Co., 13 I. C. C. Rep. 614.
MacMurray et al. vs. U. P. R. R. Co., 13 I. C. C. Rep. 531.
Wagner, Zagelmeyer & Co. vs. D. & M. Ry. Co. et al., 13 I. C. C. Rep. 160.
R. R. Com. of Ohio vs. H. V. R. R. Co., 12 I. C. C. Rep. 398.
California Fruit Growers Exchange vs. So. Pac. Co., 12 I. C. C. Rep. 553.

In the Matter of Car Shortage, 12 I. C. C. Rep. 561.
See Missouri & Illinois Coal Company vs. I. C. R. R. Co., 22 I. C. C. Rep. 39.

Railroads are called upon to so unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers and as between each other. The full burden of this great obligation is in the first instance cast upon the carriers themselves.

Merchants Coal Co. vs. Fairmount Coal Co., 160 Fed. Rep. 769.
U. S. ex rel. vs. N. & W. R. R., 143 Fed. Rep. 266.
U. S. vs. N. & W. R. R., 138 Fed. Rep. 849.
West Virginia vs. R. Co., 134 Fed. Rep. 198.
U. S. vs. N. & W. R. R. Co., 109 Fed. Rep. 831.
U. S. vs. W. V. & N. R. R. Co., 125 Fed. Rep. 252.
U. S. vs. D. L. & W. R. R. Co., 40 Fed. Rep. 101.
B. & O. R. R. Co. vs. U. S., ex rel., 215 U. S. 481.

§ 9. Effect of Interstate Commerce Commission Car Distribution Rules on Intrastate Shipments.

In the Hillsdale Car Distribution case the carrier attacked in the Commerce Court the order of the Commission requiring it to cease and desist from discrimination in the distribution of coal cars to mines on the ground that the order was invalid because it related to cars for intrastate as well as interstate shipments. The court held that there was no doubt of the authority of the Commission to make the orders complained of even though intended to have the effect apprehended by the carrier.

P. R. R. Co. vs. I. C. C., 193 Fed. Rep. 81.

The carrier appealed to the Supreme Court of the United States, but dismissed its appeal on October 13, 1914.

§ 10. Release of Cars.

In a case where a carrier, to encourage a prompt discharge and return of coal cars, put in force a rule by which all coal shippers who during the month averaged not more than five days' detention of the cars assigned to them were assigned a reward of 50 per cent additional car supply for the next month, the Federal Court held that such rule constituted an unjust discrimination in the matter of car distribution under the act as amended June 29, 1906, the proper procedure for the carrier to have followed being to assess demurrage charge for delay in releasing the cars.

U. S. vs. B. & O. R. R. Co., 165 Fed. Rep. 113, 128.

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